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No. 00-

IN THE

Supreme Court of the United States

RALPH NADER, ET AL.,

Petitioners,

v.

FEDERAL ELECTION COMMISSION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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January 30, 2001

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QUESTION PRESENTED

Whether the Federal Election Commission's Debate Regulations, which permit business corporations to sponsor nationally-televised debates that serve as campaign advertisements used by selected candidates to solicit millions of votes, exceed the Commission's authority because the Federal Election Campaign Act prohibits corporate contributions or expenditures in connection with any federal election.

PARTIES BEFORE THE COURT

The petitioners are Ralph Nader, Nader 2000 Primary Committee, Inc., Association of State Green Parties and Green Party USA.

The respondent is the Federal Election Commission.

PARTIES TO THE PROCEEDING BELOW

In addition to the parties before this Court, eight individual voters were plaintiffs below: Heidi Becker, Medea Benjamin, Phil Donahue, Mark Dunlea, Anne Goeke, Elizabeth Horton Scheff, James O'Keefe and Susan Sarandon. The court of appeals rejected their claims of standing, however, and the individual voter plaintiffs are not petitioners before this Court.

RULE 29.6 LISTING

Petitioner Nader 2000 Primary Committee, Inc. states that it is a non-profit corporation that has no parent corporation or stock owned by a publicly held company.

Petitioner Green Party USA states that it is a non-profit corporation that has no parent corporation or stock owned by a publicly held company.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Ralph Nader ("Nader"), Nader 2000 Primary Committee, Inc., Association of State Green Parties and Green Party USA respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported as *Becker* v. *FEC*, 230 F.3d 381 (1st Cir. 2000), and reprinted in Appendix A at 1a. The opinion of the district court is reported as *Becker* v. *FEC*, 112 F. Supp. 2d 172 (D. Mass. 2000), and reprinted in Appendix B at 58a.

JURISDICTION

The court of appeals entered its judgment on November 1, 2000 (App. 1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTES AND REGULATIONS INVOLVED

2 U.S.C. § 431(9)

2 U.S.C. § 441b(a)

2 U.S.C. § 441b(b)(2)

11 C.F.R. § 110.13

11 C.F.R. § 114.4(f)

These provisions are reprinted in Appendix C at 92a.

STATEMENT OF THE CASE

Petitioners, a presidential candidate and his organizational supporters, sought judicial review of certain Federal Election Commission ("FEC") regulations, claiming that they exceeded the agency's authority under the Federal Election Campaign Act ("FECA") and were distorting the 2000 campaign. [1] The district court rejected the FEC's jurisdictional challenges, but deferred to the agency's interpretation of the statute. The court of appeals affirmed.

A. *The FEC's Debate Regulations*

For almost a century, Congress has sought to limit the influence of business corporations in federal elections. *See United States* v. *International Union United Auto., Aircraft and Agric. Implement Workers of America* (*UAW-CIO*), 352 U.S. 567, 575 (1957) ("*Auto. Workers*"). In the FECA, Congress unambiguously barred contributions or expenditures by corporations and labor unions "in connection with" any federal election. 2 U.S.C. § 441b(a).

This suit asserts that the FEC exceeded its statutory authority under the FECA when it adopted regulations governing the staging and funding of candidate debates (the "Debate Regulations"). 11 C.F.R. §§ 110.13 and 114.4(f). These regulations allow business corporations to

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[1] When they filed their complaint, the petitioners were joined by both committed and uncommitted voters. The courts below rejected the standing of the individual voters, and they are not petitioners in this Court.

contribute unlimited amounts of money to fund nationally televised candidate debates that promote the presidential and vice-presidential campaigns of selected participants, so long as the debates are staged by a nonpartisan nonprofit organization.

The FEC's illegal regulations have permitted major corporations that have deep financial interests in federal legislative and regulatory affairs to sponsor presidential and vice-presidential debates showcasing the candidates of the two major political parties. These debates have played a central role in recent campaigns and have been used by the participating candidates to solicit votes from millions of voters. They serve as prime time advertisements for the candidates selected to participate in the debates.[2]

By allowing business corporations to sponsor these debates, the FEC's Debate Regulations have opened the spigot of impermissible corporate influence that Congress closed in the FECA. The FECA prohibits corporations from making any contribution or expenditure in connection with any federal election. 2 U.S.C. § 441b(a). Section 441b(b)(2) defines "contribution or expenditure" as used in § 441b(a) in broad terms to include "any direct or

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[2] Transcripts of the debates held during the 2000 presidential election campaign can be found at www.debates.org/pages/debhis2000.html. Transcripts of debates from earlier presidential campaigns can also be found at this website. These transcripts show that the formats of all of these debates have provided for unrebutted solicitations of votes by each of the debate participants.

indirect payment ... or gift of money, or any services, or anything of value ... to any candidate." Section 441b(b)(2) then articulates three narrow exceptions to this general rule which permit corporate funds to be used only for: (a) *internal* corporate communications on any subject; (b) nonpartisan registration and get-out-the-vote campaigns by a corporation *aimed at its stockholders, and executive or administrative personnel and their families*; and (c) the establishment, administration and solicitation of contributions to a separate segregated fund to be utilized for political purposes. 2 U.S.C. § 441b(b)(2).

The FEC, however, created a "safe harbor" for corporate funding of candidate debates not found anywhere on the map drawn by Congress. The Debate Regulations allow a nonpartisan nonprofit corporation to stage candidate debates "us[ing] its own funds" or "accept[ing] funds donated by corporations or labor organizations." 11 C.F.R. §§ 110.13(a) and 114.4(f)(1). Completing the circle, the Debate Regulations permit business corporations to donate funds to nonprofit organizations qualified to stage debates under 11 C.F.R. § 110.13(a)(1). 11 C.F.R. § 114.4(f)(3). The FEC's regulations thus allow corporations to make illegal contributions to support political campaign activity at the core of the federal electoral process: presidential debates that promote the candidates of the two major parties and provide them with a nationwide forum for the solicitation of votes.

B. *The Proceedings Below*

Ralph Nader, the leading third-party candidate for the Presidency in 2000, his campaign organization, and the national and state political party organizations supporting Mr. Nader's campaign brought this suit seeking to vindicate an essential precept of federal election law: that business corporations may not use their vast financial resources to tilt the electoral playing field. The complaint was styled as a petition for judicial review of agency action under the Administrative Procedure Act and invoked the district court's jurisdiction under 28 U.S.C. § 1331 and 5 U.S.C. § 706. The complaint alleged that the FEC's Debate Regulations should be set aside because the FEC has no power under the FECA to exempt corporate sponsorship of candidate debates from the statute's ban on corporate contributions and expenditures.

The complaint was filed on June 19, 2000 and swiftly followed by a motion for preliminary injunction. The FEC moved to dismiss on jurisdictional grounds. On September 1, 2000, the district court denied both the FEC's motion to dismiss and petitioners' motion for injunctive relief (App. 58a). On September 14, 2000, the district court entered final judgment. After expedited review, the court of appeals affirmed on November 1, 2000 (App. 1a).

A majority of the panel concluded that the district court had jurisdiction to review the FEC's regulations and that the petitioners had standing to seek judicial review because it was alleged that corporate funding of the presidential debates

harmed Nader's campaign (App. 15a).[3] On the merits, the court of appeals acknowledged that, as Nader argued, "[i]nsofar as such debates have the primary effect of showcasing the candidacies of those selected to participate," it might be reasonable to view corporate funding of the debates "as contributing in effect to the candidacies of the participants" and, therefore, as prohibited by the FECA (App. 37a). The court of appeals nevertheless concluded that it should defer to the FEC's interpretation of the statute under *Chevron USA, Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) ("*Chevron*"), because, it found, the FECA does not express a clear Congressional intent to prohibit the corporate funding of debates and the FEC's Debate Regulations reflect a reasonable construction of the statute (App. 37a).

REASONS FOR GRANTING THE WRIT

As the First Circuit recognized, it is reasonable to view corporate funding of the debates as contributions to the selected candidates who are showcased by the debates (App. 37a). It is precisely for this reason that the court of appeals should have set aside the FEC's Debate Regulations as contrary to the FECA. Instead, the court of appeals misapplied *Chevron*, found a gap in the FECA that does not exist, and gave the FEC discretion to create exemptions from FECA prohibitions that Congress never intended. This case provides a timely opportunity

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[3] Chief Judge Torruella would have affirmed for want of standing and mootness (App. 38a).

to refine the principles governing deference to an agency's statutory interpretation and to address an important question of federal election law that has never been considered by this Court.

I. THE FIRST CIRCUIT'S DEFERENCE TO THE FEC'S STATUTORY INTERPRETATION CONFLICTS WITH DECISIONS BY THE D.C. CIRCUIT APPLYING *CHEVRON*.

In *Chevron*, this Court held that courts should defer to an agency's reasonable interpretation of an ambiguous statute. 467 U.S. at 843. *Chevron* deference is not triggered, however, when Congress has spoken to the "precise question at issue," for then the clearly expressed intent of Congress is controlling. *Id.* at 842. In upholding the FEC's Debate Regulations, the court of appeals misapprehended its role and gave the FEC rulemaking authority never granted by Congress.

Congress plainly spoke to the precise question of whether corporations may sponsor federal candidate debates when it barred *all* corporate contributions and expenditures in connection with federal elections, with limited exceptions that do not include the staging of candidate debates. The FECA provides that it is generally unlawful for "any corporation ... to make a contribution or expenditure in connection with any [federal] election." 2 U.S.C. § 441b(a). When it imposed this broad ban, Congress provided only three narrow exceptions to its rule for the *internal* use of corporate funds. *See* 2 U.S.C. § 441b(b)(2). There is nothing in the

language of § 441b(b)(2) to suggest that these exceptions are merely illustrative and that the FEC (or the courts) may expand them to permit the use of corporate funds to sponsor televised debates designed to reach millions of voters.

Neither the court of appeals nor the FEC ever pointed to any language in the FECA (or in its legislative history) that grants the FEC power to exempt the sponsorship of candidate debates from the general ban on the use of corporate funds in connection with a federal election. Instead, the court of appeals found that Congressional *silence* on the question of debates was sufficient to create a regulatory gap that the FEC could fill with its regulations. In the context of a broad prohibitory statute, this approach cannot be squared with *Chevron*.

Congress could not, and did not need to, itemize all of the possible uses of corporate funds that it intended to prohibit. Instead, consistent with long-standing federal policy, Congress prohibited *all* contributions and expenditures of corporate funds, with three narrowly drawn exceptions that have nothing to do with staging public debates. 2 U.S.C. § 441b(b)(2). To say that, as a result, the FECA has a "gap" on this issue, and therefore that the FEC is entitled to deference when it legislates what it proclaims to be a "similar" exception for corporate-sponsored

candidate debates, takes *Chevron* well beyond its breaking point.[4]

The First Circuit's approach to the review of an agency's statutory interpretation is in conflict with a number of recent decisions by the D.C. Circuit that illustrate the proper application of *Chevron*. The D.C. Circuit has held repeatedly that an agency may not read Congressional silence as a grant of authority. *See, e.g., American Bus Ass'n* v. *Slater*, 231 F.3d 1 (D.C. Cir. 2000); *Backcountry Against Dumps* v. *EPA*, 100 F.3d 147 (D.C. Cir. 1996); *Ethyl Corp.* v. *EPA*, 51 F.3d 1053 (D.C. Cir. 1995).

In *American Bus*, the D.C. Circuit reviewed a rule promulgated by the Secretary of Transportation under the Americans with Disabilities Act ("ADA") imposing financial penalties on bus companies that did not meet prescribed standards for serving disabled passengers. 231 F.3d at 3. Relying on *Chevron*,

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[4] In its rulemaking on the Debate Regulations and in the courts below, the FEC never suggested that corporate sponsorship of candidate debates is permissible under FECA because the payments are not indirect or direct contributions to the participating candidates or because the staging of debates is not in connection with an election. In fact, the FEC has acknowledged that absent the "safe harbor" created by its regulations, corporate donations to debate staging organizations would be prohibited by the FECA. Rather, it has been the FEC's own position that the Debate Regulations were authorized by the FECA because the statute is ambiguous about the use of corporate funds for public "get-out-the-vote activities" contemplated by 2 U.S.C § 431(9)(B)(ii) and, according to the FEC, candidate debates are similar to such activities.

the district court had accepted the Secretary's argument that ambiguity existed because "[t]he plain language [of the ADA] indicates that Congress did not explicitly forbid the Secretary from including a compensation mechanism in the [busing] accessibility regulations." *Id.* at 4. The D.C. Circuit, however, overturned the district court's improper application of *Chevron* and ruled that the Secretary had exceeded the scope of his powers by establishing remedies that were not authorized in the ADA. *Id.* at 2, 6.

In his concurring opinion in *American Bus*, Judge Sentelle summed up the problem with the Secretary's approach: "Congress's failure to grant an agency a given power is not an ambiguity as to whether the power has, in fact, been granted. On the contrary, and as this Court persistently has recognized, a statutory silence on the granting of a power is a *denial* of that power to the agency." 231 F.3d at 8 (emphasis in original).

In *Backcountry Against Dumps*, the D.C. Circuit addressed the EPA's argument that because a provision of the Resource Conservation and Recovery Act ("RCRA") giving EPA authority to approve solid waste permitting plans submitted by states did not explicitly address its application to Indian tribes, the EPA was entitled to *Chevron* deference on the issue. 100 F.3d at 148, 150. The EPA contended that the courts should defer to the agency's interpretation that the statute also applies to plans submitted by Indian tribes because RCRA says nothing about this precise issue.

In rejecting the EPA's argument, the D.C. Circuit held that the analysis should begin and end with the first step of *Chevron*. *Backcountry*, 100 F.3d at 150. The D.C. Circuit rejected the EPA's claim that *Chevron* deference was triggered by legislative silence:

> To suggest, as the [agency] effectively does, that *Chevron* step two is implicated any time a statute does not expressly negate the existence of a claimed administrative power... is both flatly unfaithful to the principles of administrative law... and refuted by precedent.... [W]ere courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well.

Backcountry, 100 F.3d at 151, *quoting Ethyl Corp. v. EPA*, 51 F.3d at 1060 (emphasis in original).[5]

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[5] The constitutional issue to which the D.C. Circuit alludes arises under the non-delegation doctrine. By interpreting the FECA to give the FEC discretion to legislate its own exemptions from the general prohibition on corporate expenditures in connection with federal elections, the court of appeals raised a constitutional question that should be avoided. *See American Trucking Ass'ns, Inc. v. EPA*, 175 F.3d 1027, 1033 (D.C. Cir. 1999), *cert. granted, Browner v. American Trucking Ass'ns, Inc.*, 120 S.Ct. 2003 (2000) (no "intelligible principle" for line-drawing; reliance on speculative reasoning). Presumably because Congress

The First Circuit, however, followed the path the D.C. Circuit has repudiated. The court of appeals should have found that Congressional silence on the issue gave the FEC no authority to adopt regulations permitting corporate sponsorship of candidate debates. This Court should grant certiorari to resolve the split between the First Circuit and the D.C. Circuit, to clarify that *Chevron* deference is not triggered by legislative silence, and to declare the FEC's Debate Regulations to be in excess of its authority.

II. THE FIRST CIRCUIT'S JUDGMENT THAT THE FEC'S REGULATIONS REASONABLY IMPLEMENT THE FECA CONFLICTS WITH LONG-STANDING SUPREME COURT PRECEDENT LIMITING CORPORATE PARTICIPATION IN ELECTIONS.

Having concluded that Congressional silence rendered the FECA ambiguous with respect to corporate sponsorship of candidate debates, the court of appeals moved to the second stage of *Chevron* and determined that the FEC's Debate Regulations were neither "unreasonable, nor . . . inconsistent with the statute" (App. 36a). This finding anoints the FEC with authority to dismantle an essential precept of federal

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did not intend to delegate legislative authority to the FEC, the FECA provides no guidance to the FEC about the principles that should govern the creation of new regulatory "safe harbors" for corporate expenditures. Because the FEC has not claimed, and could not reasonably assert, that its Debate Regulations are authorized by the plain terms of the FECA, the court of appeals' decision impermissibly confers legislative powers upon the agency.

campaign finance regulation: the prohibition of corporate sponsored activities designed to advance candidate campaigns.

The court of appeals offered four reasons why the Debate Regulations reflect a reasonable interpretation of the FECA. None of these reasons bears up under scrutiny. First, the court of appeals endorsed the FEC's claim that the "'educational purposes' of a debate staged by such nonpartisan organizations 'is similar to the purpose underlying nonpartisan voter registration and get-out-the-vote campaigns'" (App. 35a). Second, the court of appeals accepted the FEC's argument that "debates are designed to educate and inform voters rather than to influence the nomination or election" of particular candidates (*id.*). Third, the court of appeals determined that the Debate Regulations are "in accord with Congressional expectations as expressed in the legislative history" (*id*). Lastly, the court of appeals found that "sponsoring a nonpartisan debate [is] not 'active electioneering'" (App. 36a).

All of these claimed justifications for the FEC's Debates Regulations fail for the same reason: they misconceive of the role the debates play in campaigns for federal office. The presidential and vice-presidential debates provide a nationally televised forum for selected candidates *to solicit votes* from the entire electorate. *See* n.2, *supra*. They are viewed by the participants, and accepted by the voting public, as battles for voter support, and they represent the single most important opportunity for the solicitation of votes during the long presidential campaign.

This is why the Debate Regulations cannot reasonably be viewed as consistent with the purpose of FECA. The prohibition of corporate contributions in connection with campaigns for federal office is a major pillar of FECA's statutory protection of the integrity of the electoral system. *See Auto. Workers,* 352 U.S. at 570. When reviewing both the FECA and analogous state laws, the Supreme Court has consistently recognized "the compelling governmental interest in preventing corruption" that supports "the restriction of the influence of political war chests funneled through the corporate form." *Austin* v. *Michigan Chamber of Commerce,* 494 U.S. 652, 659 (1990), *quoting FEC* v. *National Conservative Political Action Committee,* 470 U.S. 480, 500-501 (1985); *see also FEC* v. *National Right to Work Committee,* 459 U.S. 197, 209-10 (1982) (FECA "reflects a legislative judgment that the special characteristics of the corporate structure require particularly careful regulation"). By permitting limitless corporate funding of candidate debates, the FEC's Debate Regulations clearly violate this bedrock principle.

This Court has repeatedly observed that "state-created advantages" – such as "limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets" – "not only allow corporations to play a dominant role in the Nation's economy, but also permit them to use 'resources amassed in the economic marketplace' to obtain 'an unfair advantage in the political marketplace.'" *Austin,* 494 U.S. at 658-59, *quoting FEC* v. *Massachusetts Citizens for Life, Inc.,* 479 U.S. 238, 257 (1986) ("*MCFL*"); *see also*

National Right to Work Committee, 459 U.S. at 207-210; *Auto. Workers*, 352 U.S. at 570-584. The Court has explained why the political advantage of corporations is unfair:

> The resources in the treasury of a business corporation . . . are not an indication of popular support for the corporation's political ideas. They reflect instead the economically motivated decisions of investors and customers. The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas.

MCFL, 479 U.S. at 258.

In carving out an extremely narrow exception to the prohibitions on corporate funding carried forward by the FECA, the Court in *MCFL* enumerated three "essential" characteristics that a nonprofit corporation must possess in order to be exempted from § 441b's ban on corporate expenditures. *MCFL*, 479 U.S. at 263-64 (formed to promote political ideas; without shareholders or members with claims to corporate assets; and independent from business interests); *see also Austin*, 494 U.S. at 661-62. The nonprofit "staging" organizations authorized by the Debate Regulations lack the most important of these essential characteristics, namely "independence from the influence of business corporations." *Austin*, 494 U.S. at 664. The Court allowed

partisan spending in *MCFL* only because the nonprofit organization did not accept corporate contributions and therefore could not "serv[e] as [a] condui[t] for the type of direct spending that creates a threat to the political marketplace." *MCFL*, 479 U.S. at 264.

In striking contrast, the FEC's Debate Regulations allow business corporations to circumvent the prohibitions of § 441b by "funneling money through" debate staging organizations that "serve as a conduit for corporate political spending." *Austin*, 494 U.S. at 664. Both the language and purpose of the FECA thus contradict the court of appeals' decision. This Court should grant certiorari to correct the First Circuit's error on this critical question of federal election law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 30, 2001

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APPENDIX A

HEIDI BECKER, ET AL.,
Plaintiffs, Appellants,

v.

FEDERAL ELECTION COMMISSION,
Defendant, Appellee.

No. 00-2124

United States Court of Appeals,
First Circuit

Heard Oct. 5, 2000.

Decided Nov. 1, 2000.

Scott P. Lewis, with whom Palmer & Dodge, John C. Bonifaz, Gregory G. Luke, Brenda Wright, and National Voting Rights Institute were on brief, for appellants.

Stephen E. Hershkowitz, Assistant General Counsel, with whom Lawrence M. Noble, General Counsel, Richard B. Bader, Associate General Counsel, and David Kolker, Holly J. Baker, and Erin K. Monaghan, Attorneys, were on brief, for appellee.

Before **TORRUELLA**, Chief Judge, **LYNCH** and **LIPEZ**, Circuit Judges.

LYNCH, Circuit Judge.

Presidential candidate Ralph Nader and others assert that the prohibition in the Federal

Election Campaign Act on the use of corporate money "in connection with" federal elections invalidates certain Federal Election Commission regulations governing the funding of presidential debates. Those regulations permit corporations to make contributions from their general treasuries to qualified nonprofit, nonpartisan organizations staging federal candidate debates. Suit was brought in anticipation of the debates to be staged by the Commission on Presidential Debates (CPD) before the November 2000 Presidential Election. The district court dismissed Naders claims on the merits and entered judgment on September 14, 2000. Nader appealed and this court granted expedited review. We hold, contrary to the FEC, that we have Article III jurisdiction and, contrary to Nader, that the plaintiffs facial challenge to the debate regulations fails.

I.

With the 2000 presidential debates on the horizon, Nader, nominee of the Green Party, together with organizations supporting his campaign, as well as both supportive and uncommitted individual voters, brought this action on June 19, 2000 in the United States District Court for the District of Massachusetts. The plaintiffs challenge as ultra vires two FEC regulations, 11 C.F.R. §§ 110.13 and 114.4(f), which allow qualified nonprofit, nonpartisan organizations to accept corporate donations in staging presidential debates and allow corporations to make such donations. The plaintiffs claim that the regulations violate a provision of the Federal Election Campaign Act, 2 U.S.C. §§ 431 *et seq.*, which makes it unlawful for a corporation to make any "contribu-

tion or expenditure in connection with" the presidential elections. *Id.* § 441b(a). The Act defines "contribution or expenditure" to include "any direct or indirect payment ... or gift of money, or any services, or anything of value ... to any candidate, campaign committee, or political party or organization." *Id.* § 441b(b)(2).

On June 29, the plaintiffs moved to preliminarily enjoin the FEC from implementing the challenged regulations and requested that the district court order the FEC to enforce the FECA's prohibition on corporate contributions so as to prevent corporate sponsorship of the presidential debates. The FEC moved to dismiss for lack of jurisdiction, arguing that none of the plaintiffs could demonstrate Article III standing and that the plaintiffs had failed to exhaust their administrative remedies.

After holding oral argument on both motions on August 14, 2000, the district court on September 1 denied the FEC's motion to dismiss, concluding that Nader and the Green Party had standing to challenge the FEC's debate regulations[1] [FN1] and that plaintiffs were entitled to review because the futility exception to the exhaustion requirement of the Administrative Procedure Act applied. The court denied plaintiffs' motion for a preliminary injunction, however, finding no likelihood of success on the merits, on the basis that

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[1] The district court found that the individual voter plaintiffs lacked standing.

the regulations were based on a reasonable interpretation of the FECA entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

On September 6, the district court entered final judgment in accordance with a stipulation of the parties, and plaintiffs filed a motion for expedited review in this court, which the FEC opposed. We granted plaintiffs' motion on September 26, 2000, ordered expedited briefing, and heard oral argument on October 5.

II.

We first address the FEC's argument that plaintiffs have failed to exhaust their administrative remedies. Like the district court, we think the plaintiffs are not required to petition the FEC before bringing a facial challenge to the agency's regulations. Because the FECA itself has no provisions governing judicial review of FEC regulations, the judicial review procedures of the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.*, apply to a facial challenge to the FECA's implementing regulations. See *Perot v. FEC*, 97 F.3d 553, 560-61 (D.C.Cir.1996); *Faucher v. FEC*, 743 F. Supp. 64, 68 (1990), *aff'd* 928 F.2d 468 (1st Cir.1991). The FEC has steadfastly maintained that these debate regulations are valid and there is no point in requiring plaintiffs to go through exhaustion. See *Skubel v. Fuoroli*, 113 F.3d 330, 334 (2d Cir.1997); *Brown v. Secretary of HHS*, 46 F.3d 102, 113-14 (1st Cir.1995).

III.

We next consider whether the plaintiffs have standing. Standing doctrine involves "a blend of constitutional requirements and prudential considerations." *Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982). The constitutional component of standing stems directly from Article III's limitation of federal judicial power to deciding justiciable cases or controversies. See *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984).[2] To establish standing, it does not suffice for plaintiffs to show merely that they bring a justiciable issue before the court; they must show further that they have a sufficiently personal stake in the issue. This means that plaintiffs must show: (1) that they have suffered or are in danger of suffering some injury that is both concrete and particularized to them; (2) that this injury is fairly traceable to the allegedly illegal conduct of the defendant; and (3) that a favorable decision will likely redress the injury. *See Valley Forge*, 454 U.S. at 472, 102 S.Ct. 752; *see also Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 36 (1st Cir.1993). We first determine whether Nader has standing; we then turn to the voter plaintiffs.

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[2] The FEC makes no claim that the plaintiffs have failed to meet prudential standing requirements.

A. Whether Nader Has Standing

Nader argues that the FEC regulations allowing corporate sponsorship of the presidential debates have injured him by making corporate contributions available to his opponents (in the form of free television exposure during the debates) when such contributions are not available to him. Consequently, Nader has been put at a competitive disadvantage in the presidential race, and as a result he has had to alter his campaign strategy and spend more on advertising in order to compensate for this disadvantage.

The FEC's central counterargument is that the injuries Nader alleges are not fairly traceable to the FEC regulations he challenges. Nader's standing theory is misplaced, the FEC contends: while it might be true that Nader's exclusion from the debates puts him at a competitive disadvantage, Nader is not challenging his exclusion from the debates. As plaintiffs state in their brief: "This is a lawsuit about the *funding* of presidential debates, not a challenge to the rules governing *participation* in debates." Moreover, Nader concedes that, even if FEC regulations did not allow corporate sponsorship of the debates, the debates would likely be held anyway, with funding coming from public sources or the media; and Nader makes no claim that in such event he would have a better chance of being invited to participate. Thus Nader has failed to show, the FEC concludes, that there is a causal nexus between corporate sponsorship of the debates and the injuries he alleges as his basis for standing.

In reply, Nader argues that there is such a causal nexus. At the time that he brought this suit, Nader still stood a chance of being invited to participate in the debates. Yet if he were invited, he says, he would be forced to decline the invitation due to his principled stand against accepting corporate contributions. The consequences of this Faustian dilemma, he argues, suffice for standing: not only did it create the potential injury of having to cede to his opponents the advantage of free television exposure, but it also forced him presently to conduct his campaign and make advertising expenditures on the assumption that no such exposure would be available to him. In this sense, corporate sponsorship threatened to exclude him from the debates and had a palpable and immediate impact on his campaign strategy and expenditures.

In support of his position, Nader cites *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 36 (1st Cir.1993). In that case, Elizabeth Leonard, a Rhode Island gubernatorial candidate, challenged a state campaign finance law requiring all candidates, at the time they declared their candidacies, to choose whether to accept public funding for their campaigns. The law at issue attached certain benefits to the acceptance of public funding, such as free air time on community television and higher caps on campaign contributions. *See id.* at 29-30. Leonard chose to decline public funding and thereby to forego the accompanying benefits. As a result, this court held, she had standing. Given Leonard's choice not to accept public funding, the law put her at a potential disadvantage as to any publicly funded opponents she might face,

forcing her to structure her campaign to anticipate and offset that disadvantage. *See id.* at 36-37. "In our view," we held, "such an impact on the strategy and conduct of an office-seeker's political campaign constitutes an injury of a kind sufficient to confer standing." *Id.* at 37.

Nader argues, and the district court agreed, that his case is analogous: given Nader's choice not to accept corporate contributions, the FEC's regulations allowing corporate sponsorship of the debates effectively bar him from participating even if he qualifies for an invitation. He is thus put at a potential disadvantage in the event that he is invited and forced by his principles to decline the invitation; and he suffers a consequent present harm, in that he has been forced to structure his campaign to offset this potential disadvantage--e.g., by spending more on advertising than he would if there remained a chance that he could appear in the debates.

While the question is close, we find that Nader does have standing under *Vote Choice*. Nader has been and continues to be a significant candidate in the 2000 presidential race. At the time he brought this suit,[3] it was a genuinely

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[3] A footnote in the concurring opinion suggests that we might err in assessing Nader's standing from this chronological point of reference; it points to a Tenth Circuit case, *Powder River Basin Resource Council v. Babbitt*, 54 F.3d 1477 (10th Cir.1995), holding that a plaintiff must not only have standing at the time he brings suit, but must retain it throughout the litigation. The case has rightly been criticized for ignoring language in *Lujan v. Defenders of*

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Wildlife, 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992), clearly indicating that standing is to be "assessed under the facts existing when the complaint is filed." *Klamath Siskiyou Wildlands Ctr. v. Babbitt*, No. CV-99-1044-ST, 2000 WL 236366, at *3, 2000 U.S. Dist. LEXIS 2269, at *9 (D.Or. Feb. 15, 2000) (quoting *Lujan*, 504 U.S. at 571, n. 4, 112 S.Ct. 2130). The problem with the approach taken in *Powder River* is that it conflates questions of standing with questions of mootness: while it is true that a plaintiff must have a personal interest at stake throughout the litigation of a case, such interest is to be assessed under the rubric of standing at the commencement of the case, and under the rubric of mootness thereafter. *See, e.g., Steger v. Franco, Inc.*, 228 F.3d 889, 893 (8th Cir.2000) ("[S]tanding is based on the facts as they existed at the time the lawsuit was filed."); *White v. Lee*, 227 F.3d 1214, 1236 (9th Cir.2000) (same); *Advanced Mgmt. Tech., Inc. v. FAA*, 211 F.3d 633, 636 (D.C.Cir.2000) (same); *see also Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 69, 108 S.Ct. 376, 98 L.Ed.2d 306 (1987) (Scalia, J., concurring) ("Subject matter jurisdiction depends on the state of things at the time of the action brought; if it existed when the suit was brought, subsequent events cannot oust the court of jurisdiction.") (internal quotation marks and citations omitted). "The confusion is understandable, given [the Supreme Court's] repeated statements that the doctrine of mootness can be described as 'the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).' " *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 120 S.Ct. 693, 708-09, 145 L.Ed.2d 610 (2000) (citations omitted). But questions of standing and questions of mootness are distinct, and it is important to treat them separately. *See id.* at 709-10. We address whether Nader's claim is moot below.

open question whether he would be invited to the debates: Nader brought suit in June 2000; the CPD's first determination of which candidates would be invited to the debates was scheduled for Labor Day; within that time, it was certainly possible that Nader would be able to meet the CPD's eligibility threshold of a fifteen-percent showing of support in the national polls. Nader thus reasonably claims that, at the time he brought suit, corporate sponsorship of the debates loomed as a potential stumbling block in the path of his campaign, which forced him to make significant adjustments to his campaign strategy and use of funds.[4] "[W]e see nothing 'improbable' about the proposition," and we do not think it proper to second-guess a candidate's reasonable assessment of his own campaign. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 120 S.Ct. 693, 706, 145 L.Ed.2d 610 (2000) (finding standing to turn on the reasonableness of plaintiffs' fear that defendant's con-

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[4] The concurrence argues that Nader's injury is "overly speculative," and that our granting him standing effectively "grants standing to *any* political entrant to challenge any election regulation to which they might someday be subject." *Infra*, at 401-02 (emphasis added). Our holding is nowhere near so broad. Nader was not merely "*any* political entrant" in the presidential race. At the time he brought suit, he could have plausibly hoped to qualify for an invitation to the debates. Nor did he merely worry that "someday" corporate sponsorship of the debates would interfere with his campaign. At the time of filing, invitations to the debates were scheduled to be determined at a definite date, soon enough in the future to affect his present campaign plans.

duct would interfere with their activity). We similarly granted credence in *Vote Choice* to plaintiff Leonard's claim that she had to adjust her campaign to account for the possibility of facing a publicly funded opponent, even though in the end that possibility did not materialize. *Vote Choice*, 4 F.3d at 37; *see also Vote Choice, Inc. v. DiStefano*, 814 F.Supp. 195, 204 (D.R.I.1993). To probe any further into these situations would require the clairvoyance of campaign consultants or political pundits--guises that members of the apolitical branch should be especially hesitant to assume.

The FEC attempts to distinguish *Vote Choice* from this case on the grounds that the plaintiff in *Vote Choice* was directly subject to the law she challenged: the law specifically required all candidates to choose whether to accept public funding. By contrast, the FEC regulations in question here regulate not candidates, but rather debate staging organizations, such as the CPD, and their corporate donors. Thus, the FEC argues, the regulations could not possibly have put Nader to a "coerced choice," as was at issue in *Vote Choice*, *see* 4 F.3d at 37, simply because the regulations do not apply to Nader at all. In short, the argument goes, the plaintiff's choice in *Vote Choice* was coerced by law, while Nader's choice is wholly self-imposed.

The FEC's formalistic distinction, however, does not withstand scrutiny. The FEC regulations Nader challenges allow the CPD to accept corporate funds; the CPD's acceptance of corporate funds in turn presents Nader with a choice of whether to participate in corporate-sponsored debates. Thus, but for the regulations, Nader would

not be coerced to make the choice. Granted, the coercion wrought by the regulations is indirect, but that makes no difference; the choice is still fairly traceable to the regulations. *Cf. Fulani v. League of Women Voters*, 882 F.2d 621, 628 (2d Cir.1989) (finding candidate's exclusion from debates traceable to government's refusal to revoke League's tax-exempt status, where "[b]ut for the government's refusal ... the League, as a practical matter, would have been unable to sponsor [the debates]").[5] Moreover, this is not a case like *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992), where the agency is alleged to have unlawfully regulated a

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[5] Similarly flawed is the FEC's argument that Nader cannot claim standing on the basis that he has been put at a competitive disadvantage in the presidential race. The FEC cites a line of Second Circuit decisions in which competitive disadvantage in a political race has been recognized as a possible basis for standing, but only where the plaintiff has shown "that he personally competes in the same arena with the party to whom the government has bestowed the assertedly illegal benefit." *In re United States Catholic Conference*, 885 F.2d 1020, 1029 (2d Cir.1989), *quoted in Fulani v. Bentsen*, 35 F.3d 49, 54 (2d Cir.1994); *see also Gottlieb v. FEC*, 143 F.3d 618, 620-21 (D.C.Cir.1998); *Fulani v. Brady*, 935 F.2d 1324, 1327 (D.C.Cir.1991). The FEC argues that Nader cannot claim such standing, because he does not compete in the same arena with the CPD, which is the party to whom the FEC has bestowed the assertedly illegal benefit of access to corporate funding. Again, however, such argument unjustifiably ignores the consequences of the FEC's action: the corporate funds that the FEC has allowed the CPD to solicit in the end pay for free television exposure for the debate participants; and obviously Nader competes in the same arena with these other candidates.

third party, and the plaintiff's standing depends on an unpredictable question of whether the third party will use its discretion under the regulation so as to harm the plaintiff. *See id.* at 562, 112 S.Ct. 2130. In this case, whether the CPD will choose to accept corporate funds to help stage the 2000 presidential debates is not unpredictable; the CPD had already chosen to do so by the time Nader brought suit.[6]

In addition, the FEC's analysis of *Vote Choice*, as the FEC itself suggested at oral argument, leads to the result that no candidate could ever challenge the FEC regulations in question here, regardless of how likely he or she was to be invited to debate. If the FEC is right that only those directly governed by the regulations can challenge them, then only debate staging organizations such as the CPD or their corporate donors could ever bring challenge. But these parties are beneficiaries of the regulations, and the regulations are permissive with respect to them. Hence, these parties are unlikely ever to have any incentive--or, likewise, standing--to seek to invalidate the regulations insofar as they permit corporate sponsorship of the debates.[7] In this respect,

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[6] The CPD announced on January 6, 2000 that Anheuser-Busch would serve as one of the national financial sponsors for its 2000 presidential debates, as well as the sole financial sponsor of the October 17 debate in St. Louis, Missouri. Anheuser-Busch reportedly paid $550,000 to underwrite the October 17 debate.

[7] Rather, such parties would likely bring challenge only if they were excluded for some reason from the benefits

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then, the regulations might effectively be immune from judicial review. We see no reason to read *Vote Choice* to imply this result.[8]

Finally, we reject the FEC's suggestion in its brief that Nader's choice is self-imposed, that it "only exists because he perceives a dilemma, not because it appears anywhere in the regulations." Such a view would raise too high a bar for standing; clearly, one who challenges a governmental action may not be denied standing merely because his challenge in a sense stems from his own choosing. For example, if instead of involving corporate sponsorship, this case instead involved regulations allowing the CPD to impose speech restrictions on debate participants--e.g., a requirement that the participants say a word of gratitude to the CPD's underwriters--there would hardly be question that the debate participants would have standing to challenge such regula-

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of being able to receive or donate corporate funds in support of the debates.

[8] We recognize that the mere implication "that if [the plaintiff has] no standing to sue, no one would have standing, is not a reason to find standing." *Valley Forge*, 454 U.S. at 489, 102 S.Ct. 752 (citations omitted). But that is not what is wrong with the FEC's direct regulation theory. What is wrong with the FEC's theory is that it permits only those directly subject to the regulations to bring suit, when the very persons likely to be harmed by the regulations are not directly subject to them.

tions, even though their objection might stem purely from a choice of conscience. *Cf., e.g., Rust v. Sullivan*, 500 U.S. 173, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991) (no standing question raised where doctors challenged regulations conditioning receipt of funds on compliance with speech restrictions); *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 393, 108 S.Ct. 636, 98 L.Ed.2d 782 (1988) (self-censorship is harm sufficient for standing).[9]

In sum, the FEC regulations Nader challenges have caused him sufficient injury for the purposes of standing. By allowing corporate sponsorship of the debates, the regulations threatened to force Nader to decline an invitation to participate in the debates, and that threat affected the conduct of his campaign. In light of the FECA's concern with ensuring that corporate funds do not undermine the fairness of federal elections, we find that Nader has claimed sufficient unfairness to his campaign to establish standing. "To hold otherwise would tend to diminish the import of depriving a serious candidate for public office of the opportunity to compete equally for votes in an election," and would make it too difficult for candidates in Nader's position to challenge FEC regulations thought to impinge on that opportunity. *See Fulani v. League of Women Voters Education Fund*, 882 F.2d 621, 626 (1989).

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[9] We note also that Nader's choice is not wholly ideological; he objects to participating in corporate-sponsored debates not only because they offend his principles, but because, on his view, they are illegal.

There remains, however, a question of redressibility. At the time he brought suit, Nader could have been provided with relief that would have redressed his injury--namely, a judgment in effect preventing corporate sponsorship of the debates in time to preserve the possibility of his participation. Now that the 2000 presidential debates are over, such relief is no longer available. However, this subsequent redressibility problem is one of mootness, not standing. *See Advanced Mgmt. Tech., Inc. v. FAA*, 211 F.3d 633, 636 (D.C.Cir.2000) (noting that "[s]tanding is assessed at the time the action commences," whereas mootness concerns whether "a judiciable controversy existed but no longer remains") (citing *Friends of the Earth*, 120 S.Ct. at 709) (internal quotation marks omitted). And the FEC conceded at oral argument that Nader's case is not moot. As other courts have held in similar cases, this sort of case qualifies for the exception to mootness for disputes "capable of repetition, yet evading review": corporate sponsorship of the debates is sure to be challenged again in future elections, yet, as here, the short length of the campaign season will make a timely resolution difficult. *See Storer v. Brown*, 415 U.S. 724, 737 n. 8, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974); *Fulani v. League of Women Voters Educ. Fund*, 882 F.2d 621, 628 (2d Cir.1989); *Johnson v. F.C.C.*, 829 F.2d 157, 159 n. 7 (D.C.Cir.1987). Hence, Nader's case is not

moot, and he has satisfied the requirements for standing. [10]

B. Whether Voters Have Standing

The voter plaintiffs assert two grounds for standing. First, they argue that, as voters, they are harmed directly by the corruption of the political process allegedly caused by corporate sponsorship of the debates. Second, the voters who have decided to vote for Nader argue that, as supporters of Nader, they suffer derivatively from any injury the FEC regulations cause him.

As to the first argument, the harm done to the general public by corruption of the political process is not a sufficiently concrete, personalized injury to establish standing. Plaintiffs cite to *FEC v. Akins*, 524 U.S. 11, 118 S.Ct. 1777, 141 L.Ed.2d 10 (1998), for the proposition that any voting-related injury is per se sufficiently concrete and personalized to establish standing. But *Akins* does not open the door so wide. *Akins* held that individual voters had standing to challenge the FEC's decision not to subject the American Israel Public Affairs Committee to certain disclosure requirements. The Court's decision did not rest

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[10] Nader's interest in this case is identical to that of his party (represented by plaintiffs Green Party USA and the Association of State Green Parties) and campaign organization (the Nader 2000 Primary Committee); together, they represent the Nader candidacy that has been injured by the FEC regulations as described in the preceding discussion. Hence, by virtue of our finding that Nader has standing, we also find that these plaintiffs have standing.

merely on the fact that the voters there had suffered a "voting-related" injury. Rather, what was important was that the voters had been denied access to information that would have helped them evaluate candidates for office, when such information was specifically required by statute to be disclosed to the public. *See Akins*, 524 U.S. at 21, 118 S.Ct. 1777; *see also Common Cause v. FEC*, 108 F.3d 413, 418 (D.C.Cir.1997) (limiting "informational standing" under FECA to cases in which plaintiffs are denied information that is "both useful in voting and required by Congress to be disclosed"). In contrast, the plaintiffs here allege no such particularized burden they will suffer as a result of corporate sponsorship of the debates. Their concern for corruption of the political process "is not only widely shared, but is also of an abstract and indefinite nature," comparable to "the common concern for obedience to law." *Akins*, 524 U.S. at 23, 118 S.Ct. 1777 (internal quotation marks omitted).

As to the argument of Nader's supporters that they suffer derivatively from his injury, again, such argument sweeps too broadly. Regardless of Nader's injury, his supporters remain fully able to advocate for his candidacy and to cast their votes in his favor. *Compare Buckley v. Valeo*, 424 U.S. 1, 94, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) ("[T]he denial of public financing to some Presidential candidates is not restrictive of voters' rights ...."), *and Gottlieb v. FEC*, 143 F.3d 618, 622 (D.C.Cir.1998) ("The extra infusion of funds into the Clinton campaign did not impede the voters from supporting the candidate of their choice."), *with Bullock v. Carter*, 405 U.S. 134,

143-44, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972) (holding that expensive filing fees keeping candidates from appearing on ballot harmed voters by preventing them from voting for the candidate of their choice). The only derivative harm Nader's supporters can possibly assert is that their preferred candidate now has less chance of being elected. Such "harm," however, is hardly a restriction on voters' rights and by itself is not a legally cognizable injury sufficient for standing. *See Gottlieb*, 143 F.3d at 622 (holding that voters cannot establish standing solely on basis that their candidates have been unfairly treated).

IV.

Having determined that Nader has standing, we turn to his challenge to the validity of the debate regulations. The issue before us is a narrow one: whether the FEC debate regulations allowing corporate funding of certain debate staging organizations, 11 C.F.R. §§ 110.13 and 114.4(f), violate, on their face, the FECA. The exclusion of Nader from the 2000 Presidential election debates is not at issue, nor is any constitutional claim asserted. We review *de novo* the district court's decision to uphold the regulations, a question of law. *Strickland v. Commissioner, Maine Dept. of Human Services*, 96 F.3d 542, 545 (1st Cir.1996).

The parties dispute whether this case requires deference to the administrative agencys determination under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). *Chevron* governs the judicial review of agency regulations to ensure that they comply with the applicable

statutory scheme, and entails a two step analysis. If Congress has spoken to the precise question at issue and the intent of Congress is clear, that is the end of the matter. *Id.* at 842, 104 S.Ct. 2778. Agency regulations in accord with that unambiguously expressed intent are upheld; those that contravene that intent are invalid. But if the statute is silent or ambiguous with respect to the precise issue, then the question becomes whether the agencys regulations are based on a permissible construction of the statute. *Id.* at 843, 104 S.Ct. 2778. In assessing the agency's construction of an ambiguous provision, courts, under this second step of Chevron, must defer to reasonable agency interpretation and implementation of the provision. *United States v. Haggar Apparel Co.*, 526 U.S. 380, 383, 119 S.Ct. 1392, 143 L.Ed.2d 480 (1999). The FEC is the type of agency which is entitled to such deference where congressional intent is ambiguous. *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 37, 102 S.Ct. 38, 70 L.Ed.2d 23 (1981).

Several key statutory provisions of the FECA are at issue. The FECA prohibits corporations from making any contribution or expenditure "in connection with" any federal election, 2 U.S.C. § 441b(a), and defines "contribution or expenditure" to include "any direct or indirect payment ... or gift ... to any candidate, campaign committee, or political party or organization," *id.* § 441b(b)(2). This general prohibition is subject to three exceptions, which permit corporate funds to be used (1) for internal corporate communications; (2) for nonpartisan registration and get-out-the- vote campaigns by a corporation directed to

its stockholders and executive and administrative personnel and their families; and (3) for the establishment of a separate segregated fund used for political purposes. *Id.* § 441b(b)(2)(A)-(C). In addition, the FECA's general definition section also addresses the term "expenditure," defining it to include any payments made "for the purpose of influencing any election for Federal office," *id.* § 431(9)(A)(i), but not to include "nonpartisan activity designed to encourage individuals to vote or to register to vote," *id.* § 431(9)(B)(ii).[11]

Implementing these statutory provisions, in 1980 the FEC promulgated debate regulations to govern contributions and expenditures made in sponsorship of candidate debates; in 1996, it revised them. Under the FEC's regulatory scheme, corporate contributions and expenditures may be made to defray the costs of conducting candidate debates where those debates are held by nonpartisan organizations so long as those organizations and the structure of the debate meet certain criteria. Two interrelated regulations produce this result. First, Section 110.13 delineates the requirements for debate staging organizations, debate structure, and criteria for candidate selection necessary to qualify for exemption from the contribution and expenditure restrictions. Debate staging organizations must either be nonprofit organizations that "do not endorse, support, or op-

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[11] No party has attributed any significance to the failure to exclude this latter category from the definition of "contribution."

pose political candidates or political parties," or broadcasters that are "not owned or controlled by a political party, political committee or candidate." 11 C.F.R. § 110.13(a). The candidate debate must include at least two candidates and not be structured "to promote or advance one candidate over another." 11 C.F.R. § 110.13(b). Finally, debate staging organizations are required to use "pre-established objective criteria to determine which candidates may participate in the debate" and may not rely solely on nomination by particular parties. 11 C.F.R. § 110.13(c). Second, Section 114.4(f) allows nonprofit debate staging organizations to accept funds donated by corporations to defray costs incurred in staging candidate debates and, on the flipside, expressly permits corporations to make such donations to qualified debate staging organizations. 11 C.F.R. § 114.4(f). Complementing these sections, the FEC regulations defining the terms "contribution" and "expenditure" as covered by the Act expressly exempt the funds used in staging a qualified candidate debate from the "contributions" and "expenditures" regulated by the FECA. See 11 C.F.R. § 100.7(b)(21) (not included in "contributions"); *id.* § 100.8(b)(23) (not included in "expenditures"). In accordance with the requirements of the FECA, 2 U.S.C. § 438(d), the proposed regulations, along with the FEC's analysis, were sent to Congress

and did not become final until Congress had opportunity to express disapproval.[12]

Nader argues that these debate regulations permit corporate contributions to flow to candidates in violation of the general prohibition of Section 441b(a) and that such contributions do not fall within the limited exceptions of Section 441b(b)(2)(A)-(C); further, he rejects the FEC's contention that the regulations permissibly construe ambiguities in what corporate disbursements qualify as "contributions and expenditures" under the Act. Nader argues the FECs position must be rejected for several reasons. First, Nader contends that the general prohibition against corporate contributions and expenditures in Section 441b(a) stands alone and is not at all ambiguous. This prohibition, he says, reflects a clear congressional intent that corporate monies not go toward political activities unless they fall into one of the three narrowly drawn exceptions in Section 441b(b), none of which is applicable to candidate debates. Hence this provision reveals an unambiguous congressional intent that corporate monies not be used to sponsor candidate debates.

Second, Nader argues that when Congress enacted the more specific rules contained in Section 441b governing the use of general treasury corporate funds in 1976, it narrowed the exemp-

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[12] The Senate rejected an initial, more restrictive version of the debate regulations through this mechanism by unanimous resolution. *See* S. Res. 236, 96th Cong. (1979).

tion from the prohibition on corporate contributions so as to permit only those "nonpartisan registration and get-out- the-vote campaigns" that are aimed at the corporations' own "shareholders and executive or administrative personnel and their families." 2 U.S.C. § 441b(b)(2). While Nader acknowledges that Section 431(9)(B)(ii) contains a more general exception permitting funding for "nonpartisan activity designed to encourage individuals to vote or to register to vote," that "permission" comes in the form of an exemption to the FECA's general definition of "expenditure." Nader maintains that the enactment of a specific provision dealing with corporate contributions and expenditures and defining those terms for that purpose renders the general definition inapposite, citing the principle that a specific statute governs over a more general one. *See HCSC-Laundry v. United States*, 450 U.S. 1, 6, 101 S.Ct. 836, 67 L.Ed.2d 1 (1981).

The specific exception in Section 441b(b)(2) for "nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive and administrative personnel and their families," Nader argues, clearly does not exempt funding of candidate debates. Moreover, even if read in tandem with the general exemption excluding expenditures for "nonpartisan activity designed to encourage individuals to vote or to register to vote" in Section 431(9)(B)(ii), Nader maintains that the statute still contains no ambiguity regarding the legality of expenditures for candidate debates because a debate cannot

reasonably be described as such an activity.[13] Since sponsoring candidate debates does not fall into these exceptions to the prohibition of Section 441b(a), he contends that the clear intent of Congress as expressed in that prohibition must govern. Thus, Nader argues, there is no ambiguity in the statute that would permit the FEC, under the *Chevron* doctrine, to make policy interstitially. While disavowing any need to look at legislative history to clarify what Congress meant, Nader says that nothing in that history supports the FEC's reading. And so, Nader concludes, there is no gap in the statute on the precise question of whether corporate funds can be used to finance electoral debates.[14]

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[13] Congress clearly did intend to permit corporate expenditures, Nader says, at least for internal nonpartisan voter registration and get- out-the-vote campaigns. But it is not enough, he argues, for the FEC simply to say that debates will "stimulate voter interest and that will lead more people to register to vote or to vote." 44 Fed.Reg. 76,736 (1979). Nationally televised debates serve predominantly as "a critical campaign showpiece for participating candidates." Nader concedes that had Congress said that an exemption applies to corporate expenditures for activities "such as" voter registration, then the FEC would be in a stronger position. *See U.S. v. Haggar Apparel Co.*, 526 U.S. 380, 387, 119 S.Ct. 1392, 143 L.Ed.2d 480 (1999). But the FECA contains no such language.

[14] In a footnote in his appellate brief, Nader argues that even if Congress did leave the FEC discretion to create exceptions to the general prohibition on corporate funding, such a grant of discretion would violate the nondelegation doctrine as recently applied by the D.C. Circuit. *See American Trucking Ass'ns, Inc. v. EPA*, 175 F.3d 1027

(continued...)

In the alternative, Nader argues that even under the second stage of *Chevron* these regulations should fail. Nader maintains that the regulations cannot be a permissible construction of the statute because they are inconsistent with the purposes of the Act. Nader alleges that the FECA seeks to restrict the influence of corporate monies in political elections in order to protect the integrity of the electoral system. Since the debate regulations instead promote corporate involvement in political activity, they are not a reasonable interpretation of the FECA.

Finally, Nader responds to the common sense observation that these debate regulations have been in place for more than twenty years, that they have governed many well-publicized debates, and that Congress never once intimated that the FEC rules were contrary to its intention. Nader says that this "silence" proves nothing: a busy Congress cannot be expected to police every agency action; indeed, in 5 U.S.C. § 801(g) Congress forbade the courts to infer any such intent from its silence.[15]

(continued...)

(D.C.Cir.1999), *cert. granted, Brouner v. American Trucking Ass'ns, Inc.*, --- U.S. ----, 120 S.Ct. 2003, 146 L.Ed.2d 954 (2000). Such summary treatment does not permit a reasoned analysis and we disregard the argument.

[15] 5 U.S.C. § 801(g) states: "If Congress does not enact a joint resolution of disapproval under section 802 respecting a rule, no court or agency may infer any intent of

(continued...)

The FEC responds that Nader's emphasis on the narrowness of the exceptions in Section 441b(b)(2)(B) and Section 431(9)(B)(ii) is misplaced: the debate regulations do not interpret the scope of these exceptions, the FEC contends; rather, they interpret what types of corporate disbursements count as "contributions and expenditures" in the first instance.[16] The FEC relies on asserted ambiguities in Section 441b as well as Section 431(9) to justify its policymaking activity with regard to candidate debates. The general language of those sections, the FEC contends, says nothing indicating any congressional consideration, much less a clear congressional intent,

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(continued...)

the Congress from any action or inaction of the Congress with regard to such rule, related statute, or joint resolution of disapproval."

[16] Nader suggests in his brief that the FEC has conceded in a prior proceeding that donations to debate staging organizations would constitute prohibited "contributions" absent the "safe harbor" created by the debate regulations. However, the FEC opinion he cites simply holds that donations to *debate staging organizations that do not meet the requirements of Section 110.13* constitute prohibited contributions to the participating candidates, not that absent the regulations, donations to *any debate staging organization* would necessarily constitute unlawful contributions. *See* FEC Statement of Reasons, *In the Matter of Commission on Presidential Debates* (April 6, 1998) at 4. In other words, the FEC regulations at issue can reasonably be viewed as defining the scope of the definitions of "contribution" and "expenditure" rather than creating exceptions to their clear terms.

about whether (or in what circumstances) sponsorship of candidate debates should be treated as a "contribution" or "expenditure," which the FEC claims is the "precise question at issue" in this case. Since the general provisions leave this question open, the FEC argues that the FECA effectively delegates that question to the policymaking authority of the agency. Moreover, the FEC suggests that its construction of the statute is reasonable in three additional respects: first, the narrow construction of the prohibitory language of the Act serves to protect First Amendment interests otherwise potentially implicated by it; second, the construction of the Act accords with Congressional intent as expressed in the legislative record; and third, the debate regulations serve purposes akin to those served by the existing exceptions to the statute's prohibitions. Thus the FEC insists that the debate regulations reflect a reasonable construction of the FECA that is due *Chevron* deference. Finally, the FEC also points to the fact that the debate regulations were submitted to Congress, which did not disapprove them, and have been in force quite publicly for twenty years.

Our analysis under *Chevron* begins with the question of whether the FECA statutory scheme reveals a clear congressional intent to ban the particular activity of corporate sponsorship of the debates as permitted under the regulations. We conclude that several aspects of the statutory scheme, rather than indicating a clear congressional intent on the issue, in fact foster ambiguity. As a primary matter, it is not clear on the face of the definitions of "contribution" and "expendi-

ture" that corporate disbursements to nonpartisan debate staging organizations even fall within the scope of the Act's coverage in the first instance. Section 441b bars corporate contributions or expenditures "in connection with any election," 2 U.S.C. 441b(a), including direct or indirect corporate payments or gifts "to any candidate, campaign committee, or political party or organization." *Id.* § 441b(b)(2). Section 431(9) defines "expenditures" as any payments made "for the purpose of influencing any election for Federal office." *Id.* § 431(9)(a)(i). In neither case is it clear that corporate disbursements to nonprofit debate staging organizations fall within the ambit of the respective definitions, as such payments are not *clearly* "in connection with any election," nor are they *clearly* "indirect payments ... to any candidate," nor are they *clearly* made "for the purpose of influencing any election for Federal office." These imprecise definitional phrases display the ambiguity present in the statutory scheme. The Supreme Court itself has observed (in a different context) that the phrase, "for the purpose of influencing any election," is ambiguous. *See Buckley v. Valeo*, 424 U.S. 1, 79-80, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). In light of this uncertainty, the statute taken as a whole does not express a clear congressional intent with respect to the precise question at issue.

Other language in the FECA reinforces our finding that the statute is ambiguous. First, that Congress intended to delegate broad policymaking discretion to the FEC is confirmed by the statutory charge that the FEC shall "formulate policy under the Act." 2 U.S.C. § 437. Congress also

lodged a degree of flexibility in the definitions of "contribution" and "expenditure" in particular where it defined them to "include" certain uses and phrased the exceptions to their general prohibitions as enumerating activities that the terms "shall not include." *See id.* § 441b. The Supreme Court has recognized an element of flexibility in the term "include," as it indicates that "activities not specifically enumerated in that section may nonetheless be encompassed by it." *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 246, 107 S.Ct. 616, 93 L.Ed.2d 539 (1986). Thus the definitions are not only of uncertain scope but also employ language suggestive of flexibility.

The language and structure of the exceptions to the prohibitions also suggest ambiguity. The statutory phrase "nonpartisan activity designed to encourage individuals to vote or register to vote" at Section 431(9)(B)(ii) gives the Commission some leeway to interpret the term "activity" and to decide which activities so "encourage" people. In addition, the statutory structure gives rise to a second question: how the specific corporate funding prohibition and exception in Section 441b(b)(2)(B) are meant to operate with the more general "encouraging activity" provision of Section 431(9)(B)(ii). It is unclear whether the specific provision trumps the earlier "encouraging activity" exception by limiting it and removing any leeway in the Commission, as Nader contends, or whether Congress intended the two sections to work together and to provide some flexibility to the Commission. In light of these questions, we find the statute is not clear on its face and rules

of statutory interpretation do not compel any one particular answer to the precise question at issue.

Resort to the legislative history, even if appropriate, fails to dispel this uncertainty and provide a clear Congressional intent. We explain, beginning with the amendments Congress has made to the Act in response to judicial developments. Although the language of the statute is seemingly broad, that language has often been reviewed by courts in light of constitutional constraints, that is, the First Amendment rights of those regulated. *See United States v. C.I.O.*, 335 U.S. 106, 123-24, 68 S.Ct. 1349, 92 L.Ed. 1849 (1948) (union political endorsements directed to union members are not contributions or expenditure covered by the predecessor of the Act); *MCFL*, 479 U.S. at 249, 107 S.Ct. 616 (corporate communications about candidates that do not expressly advocate the election or defeat of a clearly identified candidate); *Maine Right to Life Committee, Inc. v. FEC*, 98 F.3d 1 (1st Cir.1996) (same), *cert. denied*, 522 U.S. 810, 118 S.Ct. 52, 139 L.Ed.2d 17 (1997); *Clifton v. FEC*, 114 F.3d 1309 (1st Cir.1997) (corporate voter guides comparing the positions of competing candidates), *cert. denied*, 522 U.S. 1108, 118 S.Ct. 1036, 140 L.Ed.2d 103 (1998); *Orloski v. FEC*, 795 F.2d 156 (D.C.Cir.1986) (corporate donations to picnic during which incumbent candidate addressed constituents).

These decisions, in turn, led Congress to amend the original statute. As the FEC notes, the statute has changed over time so as to mesh more smoothly with subsequent court decisions and other related statutes. The exceptions to the prohibition now set out in Section 441b(b) were

added to the predecessor of Section 441b in 1971 largely to codify earlier court decisions. *See, e.g., Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 409-13, 421-27, 92 S.Ct. 2247, 33 L.Ed.2d 11 (1972) (exception allowing segregated political fund codified prior case law). Congress then refined the exceptions in 1974, excepting "nonpartisan activity designed to encourage individuals to vote or to register to vote." *See* 2 U.S.C. § 431(9)(B)(ii). Finally, in 1976, Congress incorporated the prohibitions on corporate expenditures and the concomitant exceptions previously codified at 18 U.S.C. § 610 into the FECA with the enactment of Section 441b, which specifically excepted from the prohibition on corporate expenditures the internal registration and get-out- the-vote activities described earlier. *See* 2 U.S.C. § 441b(b)(2)(B).

The FEC says that Congress illuminated how these provisions were meant to work together in the legislative history:

> The conferees' intent with regard to the inter-relationship between sections [2 U.S.C. 431(9)(B)(ii)] and [2 U.S.C. 441b(b)(2)(B)] which permit such activities as assisting eligible voters to register and get to the polls, so long as these services are made available without regard to the voter's political preference, is the following: these provisions should be read together to permit corporations both to take part in nonpartisan registration and get out the vote activities that are not restricted to stockholders and ex-

> ecutive or administrative personnel, if such activities are jointly sponsored by the corporation and an organization that does not endorse candidates and are conducted by that organization; and to permit corporations, on their own, to engage in such activities restricted to executive or administrative personnel and stockholders and their families. The same rule, of course, applies to labor organizations.

H.R. Conf. Rep. No. 94-1057, at 63-64 (1976), U.S. Code Cong. & Admin. News at 946, 978-79. Indeed, a key phrase in this legislative history indicates that Congress intended to permit corporate funding of "such activities as" assisting eligible voters. Once again, rather than collapsing ambiguity, this legislative history confirms it.

Finally, although our conclusion that the debate regulations coincide with congressional intent would be the same in any event, we note that this view is consistent with Congress's apparent acquiescence in the regulations under the "report and wait" requirements of the FECA. Nader's reliance on the admonition against inferring any intent from Congress's silence in 5 U.S.C. § 801(g) is inappropriate, as that provision is limited to proposed rules submitted to Congress under the disapproval mechanism established in 5 U.S.C. §§ 801 and 802, and hence does not apply to regulations promulgated by the FEC under 2 U.S.C. § 438(d) long before the enactment of 5 U.S.C. § 801 in 1996. Moreover, this is not a situation of complete congressional inac-

tion; the failure to disapprove of the current debate regulations takes on additional significance in light of Congress's rejection of the FEC's initial proposal.[17] Thus we conclude that the FECA expresses no clear congressional intent on the precise issue in this case--the corporate sponsorship of qualified debate staging organizations to defray the costs of conducting candidate debates.

Since we have determined that the FECA does not answer the precise question at issue, the question thus becomes whether the FEC's efforts in the debate regulations to permit such corporate sponsorship, and to define the proper scope of "contribution" and "expenditure" as used by the Act, reflect a permissible construction of the statute. Under *Chevron*, absent an unambiguously expressed congressional intent on the precise issue, the courts must defer to the Commission's construction if it is reasonable and not inconsistent with the statute. *Duckworth v. Pratt & Whitney, Inc.*, 152 F.3d 1, 5 (1st Cir.1998). The debate regulations at issue pass that test.

First, the debate regulations reflect a reasonable understanding of the purposes of the FECA, and in fact parallel the purposes of its ex-

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[17] Indeed, when the Senate rejected the initial proposal, the floor statements of the resolution's cosponsors indicated that the Senate was concerned that the initial proposed regulations were too intrusive and burdensome on debate sponsors, not too permissive in allowing corporate sponsorship of debates. *See* 125 Cong. Rec. 24,957-58 (1979) (statements of Sen. Pell and Sen. Hatfield).

press exceptions. In 1979, the Commission addressed the funding and sponsorship of candidate debates in a rulemaking. The Commission decided that since the legislative policy behind the express exceptions was to permit corporations and unions to fund activity directed to the general public to encourage voter participation so long as the activity is conducted primarily by a nonpartisan organization, "permitting corporations and labor organizations to donate funds to nonprofit nonpartisan organizations for [debate] staging is consistent with congressional intent and policy." FEC, *Explanation and Justification, Funding and Sponsorship of Federal Candidate Debates*, 44 Fed.Reg. 74, 734, at 76, 736 (1979); *see also* 44 Fed.Reg. 39,348, at 39, 349. The Commission concluded that "[t]he educational purposes" of a debate staged by such nonpartisan organizations "is similar to the purpose underlying nonpartisan voter registration and get-out-the-vote campaigns." *Id.* at 39, 348. "Unlike single candidate appearances, nonpartisan debates are designed to educate and inform voters rather than to influence the nomination or election of a particular candidate. Hence, funds received and expended [by certain nonprofit organizations] to defray costs incurred in staging nonpartisan public debates are not considered contributions or expenditures under the Act." *Id.* Moreover, the FEC's debate regulations are in accord with congressional expectations as expressed in the legislative history discussed above. It is certainly within the purview of agency discretion to accord respect to congressional intent as reflected in the legislative record.

Finally, the debate regulations are not inconsistent with the definitions of "contribution" and "expenditure" provided by Section 441b. As the prohibition contained in Section 441b did not specifically address corporate donations to nonpartisan tax exempt organizations but rather addressed payments "to any candidate, campaign committee, or political party or organization," the Commission reasonably determined that the prohibition need not apply to corporate disbursements to nonpartisan tax exempt organizations for the limited purpose of staging candidate debates. The Commission's determinations that the prohibition was especially concerned with "active electioneering" to promote a particular candidate and that sponsoring a nonpartisan debate was not "active electioneering" were similarly permissible. And the fact that the regulations allow corporate contributions to candidate debates in order to encourage voter participation in a fashion not expressly permitted by the statute does not itself invalidate the regulation. "Agencies often are allowed through rulemaking to regulate beyond the express substantial directives of the statute, so long as the statute is not contradicted." *Clifton*, 114 F.3d at 1312. Hence, the Commission's views are not unreasonable, nor are they inconsistent with the statute.

We note that Nader's interpretation of the FECA is also not unreasonable. He argues that the debates in fact promote the campaigns of those invited to participate. As amicus CPD says, the goal of its debates "is to afford the members of the public an opportunity to sharpen their views, in a focused debate format, of those candidates

from among whom the next President and Vice President will be selected."[18] Insofar as such debates have the primary effect of showcasing the candidacies of those selected to participate, Nader reasonably concludes that corporate funding of the debates might be viewed as contributing in effect to the candidacies of the participants. But Congress gave the choice as to the preferred reasonable interpretation to the FEC, not to Nader. The task for the reviewing court under *Chevron* is only to undertake the narrow inquiry into whether the agency's construction is sufficiently reasonable to be accepted by the reviewing court.

The debate regulations at issue do not contravene the unambiguously expressed intent of Congress, as reflected in the FECA statutory scheme, but rather fall within the scope of the policymaking authority Congress delegated to the FEC under the Act. Moreover, the regulations reflect a permissible construction of the statute, indeed one that easily falls within the reasonable ambit of the statutory terms.

We reject Nader's challenge and affirm the district court judgment dismissing his suit. So ordered. No costs are awarded.

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[18] We acknowledge with appreciation the amicus brief submitted by the CPD.

TORRUELLA, Chief Judge, concurring.

Although I agree with the majority's affirmance of the district court's dismissal of this action, I would not have reached the merits of this case, because I believe Ralph Nader lacks standing for the reasons stated herein. Even if Nader has standing, I would find that there is no Article III case or controversy here, as Nader's claim is moot at this point in the litigation.

I.

Standing doctrine embraces both constitutional mandates and prudential considerations.[1]

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[1] Because I find that Nader lacks the constitutional requirements for standing, I have not addressed the issue of prudential standing. However, a plaintiff generally has prudential standing under § 10(a) of the APA when his interest is "arguably" within the "zone of interests to be protected or regulated by the statute in question." *National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 489, 118 S.Ct. 927, 140 L.Ed.2d 1 (1998) (quoting *Assoc. of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970)). Given that this section of the FECA is designed to prevent corruption in campaign finance, *see, e.g., FEC v. National Right to Work Comm.*, 459 U.S. 197, 209, 103 S.Ct. 552, 74 L.Ed.2d 364 (1982), and that Nader challenges it not based on corruption per se, but because it provides additional advantages to his competitors, his injury at first blush lies outside the statutory zone of protection. The fact that Nader personally is concerned with corruption in politics is particularly irrelevant to the standing question. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-74, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) ("[A] citizen's interest in proper application of the Constitution and laws ... does not state an Article III case or controversy."); *United States v. AVX Corp.*, 962 F.2d 108, 114 (1st

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See Allen v. Wright, 468 U.S. 737, 751, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1983). When a plaintiff lacks standing in a constitutional sense, this Court lacks jurisdiction under Article III. *See Warth v. Seldin*, 422 U.S. 490, 498-99, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). The constitutional component of standing derived from Article III requires that "a plaintiff ... allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen*, 468 U.S. at 751, 104 S.Ct. 3315. In other words, the plaintiff must show (1) "actual or threatened injury as a result of the defendant's putatively illegal conduct," (2) "that the injury may fairly be traced to the challenged action," and (3) "that a favorable decision will redress the injury." *Vote Choice Inc. v. DiStefano*, 4 F.3d 26, 36 (1st Cir.1993). Although these concepts are admittedly "not susceptible of precise definition," *Allen*, 468 U.S. at 751, 104 S.Ct. 3315, our case law has provided a sufficient out-

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Cir.1992) ("A mere interest in an event--no matter how passionate or sincere the interest and no matter how charged with public import the event--will not substitute for an actual injury."). Furthermore, to the extent the district court viewed the prudential analysis as considerations "weighing" in Nader's favor, the court made an error of law. If the plaintiff fails to meet the constitutional standing guidelines, no assessment of his personal concern can create an Article III case or controversy. *v. Defenders of Wildlife*, 504 U.S. at 560-61, 112 S.Ct. 2130 (three elements are the "irreducible constitutional minimum").

line of the standing map to address this petitioner.

The extent and type of injury required for constitutional standing is not easily defined. It must at the very least be "distinct and palpable," *id.* (quoting *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100, 99 S.Ct. 1601, 60 L.Ed.2d 66 (1979)), and not "abstract," "conjectural," or "hypothetical," *id.* (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 101-02, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983); *O'Shea v. Littleton*, 414 U.S. 488, 494, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974)). As I read his claim, Nader asserts two distinct theories of injury. First, he claims an injury derived from the "coercive choice" potentially posed by the allegedly illegal debate regulations. According to Nader, *if he is invited to participate in the debates*, he will be forced into a Hobbesian choice: either compromise of his corporate watchdog platform or loss of an important avenue for communication. Second, Nader claims injury as a political competitor: opponents invited to the debate benefit directly from allegedly illegal corporate sponsorship.

The problem with the majority approach, as I see it, is that the majority found standing here by collapsing these two very separate theories. If he had been invited to the debate, Nader may indeed have faced a choice between accepting corporate sponsorship and losing free national exposure. However, as he was not invited to the debate, he did not face this choice; he cannot be injured by any coercive effect it might have had, or by any strategic changes to his campaign such a choice might entail. Likewise, it is surely true

that Nader was at a competitive disadvantage because his opponents participated in the debates. He may have had to alter his strategy to cope with the free air time that they receive. However, to the extent that Nader faces this problem, it is because he is a political competitor, not because he faces a coerced choice under the *Vote Choice* analysis; his unwillingness to participate in the debates if invited did not affect Nader's response to this free air time. And as I discuss below, his injury as a political competitor is not traceable to the challenged regulations because he cannot show that the debates likely would not occur without the corporate sponsorship.[2]

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[2] Throughout, the majority examines Nader's situation in June, when this lawsuit was filed, under the assumption that standing is measured only at the time of filing. Although some cases hold that standing is only measured at that time, other cases point in the opposite direction, i.e., that a petitioner must retain standing throughout the litigation. *See, e.g., Powder River Basin Resource Council v. Babbitt*, 54 F.3d 1477, 1485 (10th Cir.1995). Such a conclusion would seriously complicate the majority's approach; far before oral argument it was quite clear that Nader would not receive an invitation to the debate, and thus his campaign strategy was determined without any influence of a potential choice.

Although the majority suggests that *Powder River* no longer provides any authority because of the Supreme Court's intervening decision in *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000), I note that although the Court described standing as "[t]he requisite personal interest that must exist at the commencement of the litigation," *id.* at 709, it also did "not license courts to retain jurisdiction over

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A.

I began by addressing the "coerced choice" theory. Relying on *Vote Choice*, Nader claims that the allegedly impermissible regulation coercively impacted the strategy and conduct of his presidential campaign. In *Vote Choice*, Elizabeth Leonard, a Rhode Island gubernatorial candidate, challenged a set of state campaign finance laws that: (i) required candidates upon declaring their candidacy to make an irrevocable election whether to use public funds; (ii) forced candidates electing to use public funds to sign an irrevocable pledge to abide by various terms and conditions of the fund grant; and (iii) created significant differences in legally allowed contributions between those who accepted and those who did not accept public funding (a so- called "contribution cap gap"). Although Leonard had not accepted the public funding and never actually faced a publicly funded opponent, we found that she retained standing to challenge the public funding provi-

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cases in which one or both parties plainly lacks a continuing interest," *id.* at 710. Friends of the Earth thus distinguished standing from mootness, but primarily to indicate that because the mootness analysis occurs at the end of litigation, there are important differences between the two doctrines. *See id.* My point here, which is supported by *Powder River* and not directly contradicted by *Friends of the Earth*, is that when standing disappears in the early stages of litigation, we should perhaps dismiss for lack of standing even if it may have existed at the time of the complaint.

sions. We reasoned that "when declaring her candidacy, Leonard had to make an irrevocable commitment" as to her use of public funding. *Vote Choice*, 4 F.3d at 36- 37. As a result, she had to plan her campaign strategy based on the possibility that her opponent (perhaps an undeclared one) would make the opposite choice; "the coerced choice between public and private financing colored her campaign strategy from the outset." *Id.* We concluded that "such an impact on the strategy and conduct of an office-seeker's political campaign constitutes an injury of a kind sufficient to confer standing." *See id.*

Nader argues, and the majority agrees, that the allegedly illegal corporate contributions to the debate organizing entity create a coercive choice of the type in *Vote Choice*, and thus standing follows. However, there is an important distinction between the two situations. *Vote Choice* did not grant Leonard standing simply because of the benefits given to her publicly funded opponents under Rhode Island campaign finance law. To do so would have premised standing on Leonard's injury as a political competitor; that is, it would have found injury due to the additional benefits accrued by her opponents. Such a theory may be viable here, and I discuss it below. *Vote Choice*, however, premised standing on the fact that Leonard's choice *not* to accept such benefits shaped her strategy throughout the race. In other words, because Rhode Island provided allegedly unlawful incentives to accept public funding, a candidate could challenge those incentives *even if* they did not ultimately rely on them. But in the present case, Nader was not coerced into making this

choice in fact, he has been saved from coercion by the lack of sufficient public support to meet the threshold set by the Commission on Public Debates (the "CPD"). Unlike Leonard, whose campaign strategy was altered by an irrevocable choice made at the start of her campaign, Nader never faced such a dilemma. If he had, I would have found standing under *Vote Choice*.

However, the majority finds potential coercion even when none actually exists. In my view, by creating a present harm from the possibility of a future one, they dangerously expand our standing jurisprudence. The majority begins with the theory that because Nader has chosen not to accept corporate contributions, he was barred from the debates at the time the CPD accepted corporate donations, whether he proved ultimately eligible or not. If the debates were not funded by corporations, however, Nader would have been able and willing to participate if he had been invited. This seems plausible to me. However, the majority continues, this "threat" of being forced to decline a debate invitation in the future "had a palpable and immediate impact on [Nader's] campaign strategy and expenditures," namely that Nader spent "more on advertising than he would [have] if there remained a chance that he could appear in the debate." I agree with the majority that it is not generally proper for this institution "to second-guess a candidate's reasonable assessment of his own campaign." However, I am not willing to grant a petitioner seeking standing free reign to allege changes in strategy forced only by the possibility of future events. Much as our standing jurisprudence requires the injury to be

"distinct and palpable," *Allen*, 468 U.S. at 751, 104 S.Ct. 3315, I believe that a strategic harm argued under *Vote Choice* must be more than a mere potentiality. And unlike the majority, I find something "improbable" about the proposition that a threatened choice three months in the future impacted Nader's strategy at the time of the complaint.

Let me expand. In June of 2000, at the time he filed this complaint, Nader admittedly failed to meet the eligibility requirements set by the CPD in January of 2000.[3] Specifically, he had not reached the 15% popular opinion threshold, although some polls had him in the 6% range. *See* Frank Newport, Gallup News Service, *Poll Releases* (October 23, 2000), *available at* http://www.gallup.com/poll/releases/pr 001023.asp. In June, Nader's potential strategies were thus either to attempt to reach the 15% threshold, so that he would be eligible for the free exposure of the debates, or not to attempt to reach the 15% threshold. However, given that he was running for President of the United States, the latter choice does not seem a viable one--whether or not he received a debate invitation. Moreover, Nader has never asserted that, because he would not accept a debate invitation under any circum-

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[3] These eligibility requirements were: (i) constitutional eligibility; (ii) appearance on a sufficient number of state ballots to achieve an Electoral College majority; and (iii) a level of support exceeding 15% according to major national polls. *See* Joint Appendix 174- 76.

stances, he resigned himself to a failed campaign that would never reach the 15% mark.

Even ignoring the infirmities of this theory of strategic impact, I note that Nader has not alleged that his campaign strategy was so affected by the potential choice which he faced. His main brief merely asserts that "Nader and his organizational supporters have been forced to adjust their campaign strategy to *compensate for the benefits conferred* upon Nader's competitors by the Debate Regulations" (emphasis added). In Nader's reply brief, he explains the strategic impact of the regulations in slightly more detail: "Nader has been forced to spend more of his campaign's money on advertising in order to overcome the free television time that candidates Bush and Gore have and will continue to receive as debate participants." In this regard, Nader is correct: the fact that his opponents will participate in the debates and that he will not (either because he is not invited or because he chooses not to) means he will have to spend additional advertising funds to match their free television time. However, Nader's phrasing indicates that the strategic impact of the debate regulations, in his mind, is only related to the receipt of illegal (according to him) money by his opponents. Nader says nothing about planning for the possibility of receiving free debate time; he has apparently assumed that he will not compete and formed his campaign strategy based on that assumption. This is very different from the strategic impact proposed by the majority, and it is also foreign to our analysis in *Vote Choice*. At base, Nader is claiming injury as a political competitor; the majority's attempt to dress

it as a future choice with a present strategic impact is misguided and not supported by either appellant's brief or their approach at oral argument. Furthermore, unlike in *Vote Choice*, the district court here failed to make clear findings of strategy, simply noting that appellants had alleged a strategic harm. *See Becker v. FEC*, 112 F.Supp.2d 172, 178-79 (D.Mass.2000). Even if it is inappropriate for a court to evaluate the actual impact of a choice on a candidate's strategy, and even if a court should accept the candidate's assessment of the impact at face value with hardly any inquiry, we need not premise injury on a supposed strategic impact not even argued by the petitioner.

In short, I find that theoretical injury caused by potential future choices is the type of injury the Supreme Court warned against in *Lujan*. In *Berner v. Delahanty*, 129 F.3d 20 (1st Cir.1997), we noted specific hurdles for abstract harms such as this:

> The [Supreme] Court placed a special gloss on cases in which a party seeks exclusively injunctive or declaratory relief. In such purlieus, standing inheres only if the complainant can show that he has suffered (or has been threatened with) "an invasion of a legally protected interest which is ... concrete and particularized," *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130, together with "a sufficient likelihood that he will again be wronged in a significant way," *Lyons*, 461 U.S. at 111, 103 S.Ct. 1660. In other words,

> the complainant must establish that the feared harm is "actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130. It bears noting that the imminence concept, while admittedly far reaching, is bounded by its Article III purpose: "to ensure that the alleged injury is not too speculative." *Id.* at 564 n. 2, 112 S.Ct. 2130.

I do not find that Nader has made a sufficient showing of a "concrete and particularized" injury; the unfocused "threat" of a coerced choice sometime hence is much like the overly speculative " 'some day' intentions" that the Supreme Court found lacking in *Lujan*. *Id.* at 564, 112 S.Ct. 2130.

The problem of abstractness and lack of imminence is further revealed by the opening the majority creates for future litigants. Because the majority analysis places its present harm in *the possibility* of a future choice, anyone that *could* face the future choice must have the same injury. No language in the majority necessarily restricts this to candidates with a significant chance of facing the future choice; presumably, the possibility of this choice affected Nader's strategy prior to June. It theoretically could have altered his decision even to enter the race. In expanding standing to Nader here, the majority grants standing to any

political entrant to challenge any election regulation to which they might someday be subject.[4]

B.

Nader's second theory of standing is not based on the strategic underpinnings of his own campaign, but on the theory that the corporate contributions to the CPD impermissibly help his competitors, essentially providing Gore and Bush with inexpensive access to extensive media coverage. The theory that a political competitor incurs injury because of an impermissible benefit to his opponent is premised on a line of cases granting standing to economic competitors. See, *e.g.*, *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 403, 107 S.Ct. 750, 93 L.Ed.2d 757 (1987).

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[4] Although the majority contends that its holding is "nowhere near so broad" as I have suggested, I am unconvinced. Their basic point is that potential choices in the future can alter strategy today, and that forced changes in strategy today can meet the injury requirement for standing. I see no clear way of distinguishing Nader's "plausible" hope that he would be invited to the debates "at a definite date" in the future, from perhaps slightly less plausible (but still possible) hopes that may occur at a more distant time. For example, Nader is running for President. Presumably, issues affecting the President of the United States inform his decision to run, which is undoubtedly part and parcel of his campaign strategy. Yet I doubt very much that the majority would grant Nader standing to challenge, say, the calculation of the presidential salary, simply because he may potentially be subject to its dictates. However, I believe that the majority's theory of standing would require them to do so if Nader asserted that such issues altered his current campaign strategy.

Courts have, however, been reluctant to adopt this "political competitor" theory of standing, not so much because the injury faced by a plaintiff is not a real one, but because that injury generally cannot be traced to the challenged regulation, nor is the injury usually redressable by invalidating the regulation. Three cases pursued by minor party candidate Lenora Fulani indicate the contours of this standing doctrine. In *Fulani v. League of Women Voters Educ. Fund*, 882 F.2d 621 (2d Cir.1989), the Second Circuit found that Fulani had standing to challenge the tax-exempt status of the League of Women Voters. Fulani claimed that the League's refusal to include her in debates deprived her of critical media exposure and competitive advantage, as well as the opportunity to communicate her political ideas to the electorate. The court found that:

> [T]he loss of competitive advantage flowing from the League's exclusion of Fulani from the national debates constitutes sufficient "injury" for standing purposes, because such loss palpably impaired Fulani's ability to compete on an equal footing with other significant presidential candidates. To hold otherwise would tend to diminish the import of depriving a serious candidate for public office of the opportunity to compete equally for votes in an election, and would imply that such a candidate could never challenge the conduct of the offending agency or party.

Fulani v. League, 882 F.2d at 626. The Second Circuit then found that the other prerequisites for standing were met, because removing the League's not-for-profit status would end the League's ability to sponsor debates, and probably would have meant the absence of any debates in the 1988 campaign season.

In *Fulani v. Brady*, 935 F.2d 1324 (D.C.Cir.1991) and *Fulani v. Bentsen*, 35 F.3d 49 (2d Cir.1994), both the Second and the D.C. Circuits cut back on this approach, in cases more nearly mirroring our own. In *Fulani v. Brady*, Fulani sought standing to challenge the tax-exempt status of the CPD based on its decision that she lacked a realistic chance of being elected President, and its concordant refusal to invite her to the 1988 presidential debates. The D.C. Circuit focused its inquiry on the fact that Fulani was challenging a tax exemption, and noted strong judicial precedent against the ability to challenge the tax treatment of a competitor. *See id.* at 1327. In particular, Fulani could not meet the standing requirements of traceability and redressability: first, many factors beyond the tax-exempt status of the CPD were influential in excluding Fulani from the debates; second, revocation of the tax-exempt status of the CPD would not necessarily have any impact on the purportedly unfair provision of media coverage to the major party candidates. *See id.* at 1328-29. Although Nader is not challenging a tax exemption, his claim is once removed because it does not challenge the entity hosting the debate (the CPD) but that entity's source of funds. At best, a Nader victory here could require the CPD to find other sources of

funds; it would not necessarily reduce his opponent's television exposure, nor would it likely cancel the debates.

In *Fulani v. Bentsen*, Fulani again challenged the tax status of the League. However, the Second Circuit, noting that the debate in question was co-sponsored by CNN, refused to find injury based on "the alleged incremental advantage accorded participants in debates in which the League plays a sponsoring role." *Id.* at 52-53. In other words, the fact that Fulani's competitors might benefit from the accouterments of League sponsorship was insufficient to create standing. Similarly, the fact that Nader's competitors may gain incremental advantages through their association with corporate sponsors is an insufficient basis for standing, given that a decision by this Court will have little or no impact on the exposure they gain due to the debate.

Moreover, the Second Circuit has indicated that for a plaintiff to gain standing as a political competitor, he must "personally compete in the same arena with the same party to whom the government has bestowed the assertedly illegal benefit." *In re United States Catholic Conference*, 885 F.2d 1020, 1029 (2d Cir.1989). In this case, the benefit has perhaps been conferred upon the sponsoring corporations, who at the most are allowed to further their political viewpoint by sponsoring a two-person debate, and at least are given additional air-time for their beer and pretzels. Perhaps the benefit has been conferred upon CPD, the entity which receives the allegedly illegal contributions. Nader would argue that Gore and Bush receive the unlawful benefit, and that as

their competitor he has standing. However, *Fulani v. Bentsen* explicitly refused to extend the competitive standing rule to encompass this removed level of competition. *Id.* at 54 ("We decline to extend the rule of *Catholic Conference* to encompass not only a plaintiff's competitors in a defined arena, but also any entity that provides a tangential benefit to those competitors."). Nader does compete with Bush and Gore, who may or may not have received tangential benefits from corporate sponsorship of the debates; however, I fear that expanding competitor standing to this extent gives plaintiffs the ability to challenge a host of regulations that, while undoubtedly having incidental beneficial effects on their competitors, are not traceable to a concrete, particularized harm. *See Catholic Conference*, 885 F.2d at 1028; *see also Gottlieb v. FEC*, 143 F.3d 618, 621 (D.C.Cir.1998) (AmeriPAC could not challenge matching funds received by the Clinton campaign, because it was never in a position to receive such matching funds itself).

C.

The majority rues the fact that this analysis "leads to the result that no candidate could ever challenge the FEC regulations in question here, regardless of how likely he or she was to be invited to the debate." First, I dispute this premise. Although no candidate may be able to challenge the regulations under a political competitor theory of standing, it is certainly possible that a candidate would have standing under the *Vote Choice* theory, if he or she actually faced a coerced choice. If Nader had reached the 15% mark, been invited to debate, and then refused to do so, I

would be tempted to find standing here. Al Gore or George W. Bush could potentially have challenged the regulations as well. Furthermore, under the competitor theory, a rival debate organization or a potential non-corporate sponsor that could not afford the CPD's sponsorship prices might have successfully defended their standing as an economic competitor. In any event, even in the majority's refusal to read *Vote Choice* as implying that "the regulations might effectively be immune from judicial review," the majority admits that the fact that the plaintiff might be the best person to have standing does not in itself give them standing. *See Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 489, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982).

I do not doubt "the powerful beneficial effect that mass media exposure can have today on the candidacy of a significant aspirant seeking national political office." *Fulani v. League*, 882 F.2d at 626. But this effect alone is insufficient to confer standing on such an aspirant simply because his claim is related to this mass media exposure.

II.

The majority gives short shrift to the question of mootness, stating conclusively that "this sort of case qualifies for the exception to mootness for disputes 'capable of repetition, yet evading review.' " I have no quarrel with the claim that this case is capable of repetition: under the majority's theory of standing, in fact, it is all *too* capable of repetition as any candidate or potential candidate could claim that their strategy is af-

fected by the potential that they will be subject to a choice down the campaign trail.

The Supreme Court has indicated that election cases are particularly privy to this mootness exception. *See Storer v. Brown*, 415 U.S. 724, 737 n. 8, 94 S.Ct. 1274, 39 L.Ed.2d 714; *Rosario v. Rockefeller*, 410 U.S. 752, 756 n. 5, 93 S.Ct. 1245, 36 L.Ed.2d 1 (1973); *Dunn v. Blumstein*, 405 U.S. 330, 333 n. 2, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972); *Moore v. Ogilvie*, 394 U.S. 814, 816, 89 S.Ct. 1493, 23 L.Ed.2d 1 (1969). However, all of these cases involved burdens placed on candidates or voters in order for them to participate in the election process, an inherently time-sensitive issue.[5] For example, in *Storer*, petitioners challenged ballot access and nomination procedures necessarily occurring between the primary and the general election. *See id.* at 726-28, 94 S.Ct. 1274; *see also Rockefeller*, 410 U.S. at 752-56, 93 S.Ct. 1245 (similar issue). *Dunn* involved a challenge to state residency requirements which a would-be voter might not be able to challenge until just before the election, and which would without the exception become moot immediately after

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[5] In addition, these election exceptions to mootness involved First Amendment constitutional challenges, an area afforded special treatment by the Court's standing and mootness jurisprudence. *See, e.g., Rust v. Sullivan*, 500 U.S. 173, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991) In contrast, Nader does not raise a First Amendment challenge of any sort, but simply challenges the legality of FEC regulations. The majority recognizes this distinction, but chooses to rely upon it to find an exception here.

the election. *See id.* at 333-34, 92 S.Ct. 995. In *Fulani v. League*, Fulani's standing arose only at the time she was not invited to the debates, which meant that not enough time remained to litigate prior to the debates being held. *See id.* at 628. It is ironic that the very rationale which the majority used to grant Nader standing should now (I believe) lead them to find mootness. Under the majority's new standing jurisprudence, Nader could have brought his suit at any time after announcing his candidacy and possibly before doing so. A future petitioner who faces this same strategic problem will have ample time to sue in a manner so that we can redress his injury if appropriate.

Moreover, the procedural history of *this* case indicates that future cases in which standing arises will not necessarily evade our review. Nader's complaint was filed on June 29, 2000. However, oral argument was not until six weeks later, on August 14, 2000. The argument was delayed by both the recusal of the original assigned judge and by at least one unopposed motion to extend time (made by the FEC). Although the district court issued its Memorandum and Order relatively quickly, on September 1, 2000, two more weeks passed until a final judgment was entered on September 18, 2000. This Court granted expedited review and oral arguments were heard on October 5, 2000. Although we have not issued our opinion until now, we certainly could have done so with more alacrity if it had proved necessary. Given the procedural history of this case, it can hardly be said that an Article III case or controversy on the issues raised would not be capa-

ble of full litigation and appellate review in a sufficient time to prevent mootness.

This case should never have reached the merits of the challenge to the FEC regulation. Nader lacked standing, either because his injury was hypothetical, or because his injury, although potentially real, was not traceable to the challenged regulations and not redressable by the invalidation of the challenged regulations. Moreover, by the time the litigation reached this court, Nader's harm had become moot. Although I agree with the majority that this appeal should be dismissed, I would not have reached the merits.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

HEIDI BECKER, MEDEA BENJAMIN, PHIL DONAHUE, MARK DUNLEA, ANNE GOEKE, ELIZABETH HORTON SCHEFF, RALPH NADER, JAMES O'KEEFE, SUSAN SARANDON, NADER 2000 PRIMARY COMMITTEE, INC., ASSOCIATION OF STATE GREEN PARTIES and GREEN PARTY USA,

Plaintiffs,

v.

FEDERAL ELECTION COMMISSION,

Defendant.

Civil Action
No. 00-11192-PB

MEMORANDUM AND ORDER

September 1, 2000

SARIS, U.S.D.J.

INTRODUCTION

Plaintiff Ralph Nader is the nominee of a third party, called the Green Party, for President of the United States. Nader, together with several individuals and organizations supporting his campaign,[1] brings this action challenging twenty-year-old regulations adopted by the Federal Election Commission ("FEC"), found at 11 C.F.R. §§ 110.13(a)(1) and 114.4(f)(1) and (3) ("the Debate Regulations"). Arguing that these Debate Regulations permit corporations to make contributions and expenditures to sponsor federal candidate debates in violation of the Federal Election Campaign Act ("FECA"), 2 U.S.C. § 431 et seq., they seek a preliminary injunction to enjoin the FEC from implementing the Debate Regulations. The complaint also asks the Court to order the FEC to enforce the prohibition against the use of corporate money in the staging of federal candidate debates. The first scheduled presidential debate is October 3, 2000.

The FEC has moved to dismiss the complaint for lack of jurisdiction on the following

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[1] The plaintiff group also includes individual voters who have thrown their support behind Nader's candidacy. The lead plaintiff is a registered independent voter who has not yet decided for whom she will vote, but who does not plan to vote for either Vice President Al Gore or Texas Governor George W. Bush.

grounds: 1) that its administrative procedures, 2 U.S.C. § 437g, are the exclusive remedy for complaints about violations of the FECA, and that the judicial review section of the Administrative Procedure Act, 5 U.S.C. § 706, is inapplicable; 2) that plaintiffs failed to exhaust their administrative remedies by petitioning the Commission for a rule making on the Debate Regulations; and 3) that none of the twelve plaintiffs can demonstrate Article III standing.

The Commission on Presidential Debates ("CPD"), a nonprofit corporation which sponsored presidential and vice-presidential debates in 1988, 1992, and 1996, has filed a brief as amicus curiae. The CPD is the sponsor of the October 3 debate. According to the complaint, the CPD has solicited millions of dollars from for-profit corporations to help stage the presidential debates. On January 6, 2000, it announced that Anheuser-Busch will serve as one of the national financial sponsors for its 2000 presidential debates, as well as the sole sponsor for the debate scheduled for October 17, 2000 in St. Louis, Missouri. The CPD argues that the Debate Regulations are necessary to protect the First Amendment rights of private debate sponsors; that plaintiffs have failed to demonstrate wide-spread "influence and corruption" by corporations in CPD decision-making that would amount to irreparable harm; and that the public has a strong interest in having the debates go forward.

After hearing, and review of the submissions, the Court **DENIES** both motions. Although Mr. Nader and the Green Party have standing, the Court concludes that the Debate Regulations are not contrary to law.

DISCUSSION

1. Statutory Scheme

The FECA makes it unlawful for any corporation[2] "to make a contribution or expenditure in connection with any election" for federal office. 2 U.S.C. § 441b(a). For purposes of § 441b, the statute defines the term "contribution or expenditure" to include "any direct or indirect payment, distribution, loan, advance, deposit, or gift of money or any services, or anything of value . . . to any candidate, campaign committee or political party or organization, in connection with any election" to federal office. Id. § 441b(2). However, it excludes from the definition: (1) communications "on any subject" by a corporation to its stockholders and executive or administrative personnel and their families; (2) "nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families"; and (3) "the establishment, administration, and solicitation of contributions to a separate segre-

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[2] These statutory provisions and the implementing regulations apply to labor unions as well.

gated fund to be utilized for political purposes." Id. §§ 441b(b)(2)(A)-(C).

The general definition section of the FECA contains definitions of "contribution" and "expenditure." Both terms include any gift, loan, deposit, or advance of money or "anything of value . . . for the purpose of influencing any election for Federal office." Id. §§ 431(8)(A)(1), 431(9)(A)(i). These definitions exclude "any payment made or obligation incurred by a corporation or labor union which, under § 441b(b) of this title, would not constitute an expenditure by such corporation or labor organization." Id. §§ 431(8)(B)(vi), 431(9)(8)(v).

Of great significance to this dispute, the general definition of "expenditure" also excludes "nonpartisan activity designed to encourage individuals to vote or to register to vote." Id. § 431(9)(B)(ii).

The FEC provided a helpful legislative history. Amendments to the Act in 1974 exempted "nonpartisan activity designed to encourage individuals to vote or to register to vote" from the Act's general definition of "expenditure." Id. § 431(9)(B)(ii). In 1976, Congress incorporated into the Act the long-standing prohibition of corporate contributions and expenditures that had been in 18 U.S.C. § 610. Congress included a provision exempting from the definition of "contribution or expenditure" "nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or

administrative personnel and their families, or by a labor organization aimed at its members and their families." Id. § 441b(b)(2)(B).

Recognizing that these amendments, "which were added to the law at different times, overlap in that both make exceptions to the term 'expenditure' for internal communications and for nonpartisan registration and get-out-the-vote activity," the Conferees explained how they intended this provision to work with the exemption from the general definition of "expenditure" for "nonpartisan activity designed to encourage individuals to vote or to register to vote," id. § 431 (9)(B)(ii):

> The conferees' intent with regard to the interrelationship between sections [2 U.S.C 431(9)(B)(ii)] and [2 U.S.C. 441b(b)(2)(B)] which permit such activities as assisting eligible voters to register and get to the polls, so long as these services are made available without regard to the voter's political preference, is the following: these provisions should be read together to permit corporations both to take part in nonpartisan registration and get-out-the-vote activities that are not restricted to stockholders and executive or administrative personnel, if such activities are jointly sponsored by the corporation and an organization that does not endorse

> candidates and are conducted by that organization; and to permit corporations, on their own, to engage in such activities restricted to executive or administrative personnel and stockholders and their families. The same rule, of course, applies to labor organizations.

H.R. Rep. No. 94-1057, at 63-64 (1976), quoted in FEC, Explanation and Justification, Funding and Sponsorship of Federal Candidate Debates, 44 Fed. Reg. 76,734, 76,735 (1979) ("1979 Explanation").

In 1979, Congress also added exceptions to the general statutory definitions of "contribution" and "expenditure" that exempt "any payment made or obligation incurred by a corporation or a labor organization which, under section 441b(b), would not constitute an expenditure by such corporation or labor organization." 2 U.S.C. § 431(8)(B)(vi) and 431(9)(B)(v).

2. Regulatory Scheme

In 1979, the FEC addressed the funding and sponsorship of candidate debates in a rule making. Pursuant to its statutory authority to "formulate policy with respect to" the Act, id. § 437c(b)(1), the FEC determined that "[c]andidate debates stimulate voter interest and hence encourage individuals to register to vote or to vote," and concluded that "permitting corporations and labor organizations to donate funds to nonprofit

nonpartisan organizations for [debate] staging is consistent with congressional intent and policy under sections 431(f)(4)(B) and 441b(b)(2)(B)." 1979 Explanation, 44 Fed. Reg. at 76,736.

The FEC explained:

> The educational purposes of nonpartisan public candidate debates is similar to the purpose underlying nonpartisan voter registration and get-out-the-vote campaigns. Unlike single candidate appearances, nonpartisan debates are designed to educate and inform voters rather than to influence the nomination or election of a particular candidate. Hence, funds received and expended [by certain nonprofit organizations] to defray costs incurred in sponsoring nonpartisan public debates are not considered contributions or expenditures under the Act.

Id. at 39,348.

Pursuant to a 1980 rule making,[3] the FEC issued the so-called "Safe Harbor" Debate Regula-

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[3] As the FEC explained, the agency's first draft of the Debate Regulations was sent to Congress as required by 2 U.S.C. § 438d(d), and Congress disapproved of them on September 18, 1997 for reasons which did not include the proposed regulatory provisions allowing corporations and unions to donate funds for the cost of candidate debates (continued...)

tions interpreting § 441b to permit certain organizations to stage and finance political debates among candidates for federal office. These Debate Regulations, which were revised in early 1996, set eligibility requirements for entities that may stage debates among candidates for any federal office, and requirements for the structure and selection of participants in candidate debates by such organizations. See 11 C.F.R. § 110.13.

A debate-staging organization must be a nonprofit organization that "do[es] not endorse, support or oppose political candidates or political parties[,]" id. § 110.13(a) (1), or a media entity "not owned or controlled by a political party, political committee or candidate." Id. at (a) (2). A debate must "include at least two candidates[,]" and the staging organization may not "structure the debates to promote or advance one candidate over another." Id. § 110.13(b). Staging organizations "must use pre-established objective criteria to determine which candidates may participate in a debate[,]" and for general election debates, they "shall not use nomination by a particular political party as the sole objective criterion to determine whether to include a candidate in a debate." Id. § 110.13(c).

(continued...)

sponsored by nonprofit, nonpartisan organizations. See 25 Cong. Rec. 24,957 (1979).

The Debate Regulations permit corporations and labor organizations to donate funds to staging organizations that meet these various requirements for safeguarding against promoting or opposing the election of particular candidates. See id. § 114.4(f)(3). A complementary provision permits the staging organizations that are qualified under 26 U.S.C. §§ 501(c) (3) & (C) (4) to use corporate or labor union funds, as well as their own funds, to defray the costs of staging debates. 11 C.F.R. § 114.4(f)(1). Donations authorized by § 114.4(f) are also expressly excluded from the Commission's general regulatory definitions of "contribution" and "expenditure." See id. §§ 100.7(b)(21) (excluding from "contribution") & 110.8(b)(23) (excluding from "expenditure").

The regulations were revised in 1995 to define the term "express advocacy" as required by FEC v. Massachusetts Citizens For Life, Inc., 479 U.S. 238 (1986) ("MCFL"), and to describe certain non-profit organizations that are exempt from the prohibition on independent expenditures. See 60 Fed. Reg. 35,292, 35,305 (1995). Certain changes were made in the Debate Regulations. For example, while the previous rules "had expressly allowed staging organizations to restrict general election debates to major party candidates," the "new rules do not allow a staging organization to ban minor party candidates or independent candidates from participating simply because they have not been nominated by a major party." 60 Fed. Reg. 64262, 64,201 (1995). As required by 2 U.S.C. § 438(d), in December 1995

the Commission submitted these revised regulations to Congress before promulgating them, and Congress took no action to disapprove them during the subsequent 30-day period the statute provides.

3. Jurisdiction

a. The Administrative Procedure Act

Courts may review challenges to FEC regulations under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2) (A) and (C), to determine whether those regulations exceed the FEC's authority. See, e.g., Maine Right to Life Comm., Inc. v. FEC, 98 F.3d 1, 1 (1st Cir. 1996) (affirming a district court's invalidation of an FEC regulation defining "express advocacy" under the APA); Perot v. FEC, 97 F.3d 553, 560-61 (D.C. Cir. 1996) (instructing that an action seeking judicial review of an FEC regulation should be brought under the APA); Faucher v. FEC, 743 F. Supp. 64, 68-69 (D. Me. 1990) (discussing the court's basis for exercising jurisdiction in an APA case challenging an FEC regulation) , aff'd 928 F.2d 468 (1st Cir. 1991). Parties who are "adversely affected or aggrieved by agency action" may seek that review. 5 U.S.C. § 702.

b. Exhaustion of Administrative Remedies

The FEC argues that plaintiffs must first exhaust their administrative remedies. FECA

specifically provides for judicial review when a complainant is dissatisfied with an FEC decision that no illegality has occurred. 2 U.S.C. § 437g(a)(8)(A). Because the FECA does not address a facial attack on the validity of a rule, the APA applies. See Perot, 97 F.3d at 560. Where a plaintiff is challenging the validity of a regulation, the exhaustion rule normally requires that the plaintiff petition the agency for a rule making. See Skubel v. Fuoroli, 113 F.3d 330, 334 (2d Cir. 1997). The doctrines of administrative exhaustion and primary jurisdiction are judge-made rules to be applied on a case-by-case basis, taking into account the purposes of the doctrines. See Brown v. Secretary of HHS, 46 F.3d 102, 113-14 (1st Cir. 1995). Courts are "equipped to settle" issues of law in cases involving challenges to an agency's power. Id.; see Ezratty v. Puerto Rico, 648 F.2d 770, 774 (1st Cir. 1981) (finding that exhaustion is not required when "the issue [is] a pure matter of law as to which specialized administrative understanding plays little role"). As this challenge involves a question of law involving the agency's power, exhaustion is not required.

Plaintiffs also convincingly invoke cases applying the futility exception to exhaustion, since here the FEC was highly unlikely to revoke its 20-year old regulation and has, in fact, maintained that the regulation is valid. See Skubel, 113 F.3d at 334 (finding that the district court properly applied the futility exception where an agency expressed an unwillingness to reconsider its position).

c. Standing

The most difficult jurisdictional question involves standing. Under the 3-pronged analysis for constitutional standing, laid out in Allen v. Wright and its progeny, a plaintiff must allege: (1) personal injury that is; (2) fairly traceable to the defendant's allegedly unlawful conduct; and (3) likely to be redressed by the requested relief. 468 U.S. 737, 751-52 (1984); see also Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (holding that plaintiffs must show an "'injury in fact' – an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not 'conjectural' or 'hypothetical,' which is fairly traceable to the challenged action, and is likely to be "redressed by a favorable decision") (internal quotations and citations omitted). The Allen Court instructed judges to analyze whether a claimed injury is too abstract; whether the line of causation between the illegal conduct and injury is too attenuated; and whether the prospect of obtaining relief from the injury as a result of a favorable ruling is too speculative. See Allen, 468 U.S. at 751-52.

In addition to the Article III standing requirements,

> Several prudential considerations also infuse standing determinations. These considerations, which militate against standing, principally concern whether the litigant (1) asserts the rights and interests of a third party

> and not his or her own, (2) presents a claim arguably falling outside the zone of interests protected by the specific law invoked, or (3) advances abstract questions of wide public significance essentially amounting to generalized grievances more appropriately addressed to the representative branches.

Benjamin v. Aroostook Med. Ctr., Inc., 57 F.3d 101, 104 (1st Cir. 1995) (citations omitted).

Plaintiffs Nader, the Nader 2000 Primary Committee, the various Green Party branches and associations, and the individual voters all assert that they will suffer an injury unless the FEC regulations permitting corporate underwriting of debates are declared invalid. I'll address the plaintiffs' positions vis-a-vis standing by category.

i. Nader

Plaintiffs assert that, whether or not Nader is invited to participate in the CPD debates, he suffers harm as a result of the unlawful regulations. If he does not participate, his opponents will "directly benefit from illegal corporate-sponsored advertising," and if he is invited to participate, he will be forced to choose between compromising his corporate watchdog platform, or forgoing the best opportunity to communicate his views to the public.

It is important to point out what Nader is not asserting as an injury. He has not argued that the use of corporate funds in the debates will have any impact on the substance of the debates. And if he is excluded, he likewise has not argued that the corporate sponsorship was the basis for that exclusion. He does not challenge the underlying criteria for debate eligibility, only the corporate underwriting that pays, one presumes, for the microphones and debate hall stages.

The best support for Nader's position is a First Circuit case, Vote Choice, Inc. v. DeStefano, in which the court held that a gubernatorial candidate had standing to challenge a Rhode Island campaign finance law because the law forced the candidate into a "coerced choice" between public and private financing, which impacted "the strategy and conduct" of her campaign. 4 F.3d 26, 36-47 (1st Cir. 1993). The First Circuit was persuaded that having to campaign under a law which "colored [the plaintiff's] campaign strategy from the outset" was sufficient injury. Id. Here, plaintiffs argue that standing arises from the coerced choice Nader must make in deciding whether to seek to participate in debates which are, in his view, unlawfully funded by corporations and contrary to his anti-corporate platform. If having to adjust campaign strategy around an illegal financing law constituted sufficient injury in Vote Choice, Nader has alleged sufficient injury under the first prong of Allen.

Defendants emphasize case law which erects high hurdles in prevailing on "political competitor standing" where the candidate complains of unlawful regulation, or lack of regulation, of another entity – here, the CPD. See Lujan, 504 U.S. at 562. The recent cases on competitor do standing cut against Nader somewhat. In Gottlieb v. FEC, 143 F.3d 618, 620 (D.C. Cir. 1998), the court took a narrow view of "competitor standing," requiring that when challenging a government benefit granted to another group or entity, the "competitor" must himself be eligible to receive the same benefits as the person or group it is challenging. Gottlieb extended the stingy approach to competitor standing developed in cases involving challenges to the tax-exempt status of various organizations, and applied it to a challenge involving a campaign finance law. See, e.g., In re United States Catholic Conference, 885 F.2d 1020, 1028-29 (2d. Cir. 1989) (denying competitor-advocate standing to pro-choice, non-profit, tax-exempt organizations challenging the tax-exempt status of Catholic Church because they did not compete with the church's alleged electioneering); Fulani v. Brady, 935 F.2d 1324, 1331 (D.C. Cir. 1991) (denying standing to a minor party candidate seeking to challenge the tax-exempt status of debate sponsors); but see Fulani v. League of Women Voters Educ. Fund, 882 F.2d 621, 625 (2d Cir. 1989) (finding standing to challenge the tax-exempt status of debate sponsor because plaintiff had been denied right to participate, thus losing substantial media exposure, and

her injury was traceable to the League's unlawful use of a partisan participation criteria).[4]

Hence, under a narrow, Gottlieb-type view, the FEC argues that Nader himself is not a debate staging organization eligible to benefit from the corporate financing regulation, and thus lacks standing to challenge corporate funding of the CPD. However, Nader contends that the Democratic and Republican candidates themselves (as opposed to the CPD) receive a benefit from the regulation, in the form of corporate-sponsored publicity that frees those candidates and their parties from needing to use their own funds to get out their message. Participation in the debates also confers an aura of legitimacy upon his opponents. Using the analysis in Gottlieb and United States Catholic Conference, plaintiff must show that "he personally competes in the same arena with the same party to whom the government has bestowed the candidates illegal benefit." Gottlieb,

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[4] Defendants cite a follow-up Second Circuit case, Fulani v. Bentsen, in which the court denied the same candidate competitor standing to challenge the tax-exempt status of the League of Women Voters. 35 F.3d 49, 53 (2d Cir. 1994). However, in that case, Fulani had been excluded by both co-sponsors of the debate, the League and CNN. CNN, of course, could have excluded her in any event. Fulani nonetheless argued that the incremental advantage of having the League as a co-sponsor conferred a benefit on her adversaries. The court rejected her contention that voters watching a debate sponsored by both CNN and the League would come to a more negative view of Fulani than voters watching a debate sponsored solely by CNN. See id.

143 F.3d at 621. Nader maintains that, as a candidate from a minor party, he will be personally disadvantaged by the benefit his opponents from the major parties will receive from "illegal, corporate-sponsored advertising." I find that this is a sufficient personal injury under prong one of Allen.

As to prongs two and three of the Allen test, Nader's injury is traceable to the Debate Regulations. However, it's not clear that enjoining reliance on these regulations will redress all of Nader's injuries. The benefit flowing through the CPD to his competitors, in terms of free media exposure, is traceable to the regulation; however, it's worth noting that the major party candidates could get that same economic benefit (i.e. being relieved from using their own funds to get out their message) even if CPD was out of the picture entirely. If a media organization, for example, stepped in, ran the debates, and excluded Nader, his competitors would still be granted an advantage. It would not be, however, an allegedly unlawful, corporate-sponsored advantage.

While standing is a close question, I conclude that, at the very least, Nader is harmed under the coerced choice analysis in Vote Choice. I also find that Nader has made a persuasive argument that he should qualify for "political competitor standing," given the economic benefit flowing to his opponents in the election. Furthermore, the "prudential standing" considerations weigh in Nader's favor. Although he does

advance what one could call an abstract social interest, it is an interest around which he personally has devoted much of his campaign resources and which has been a key focus of his message to the public. As a candidate who may not, and wishes not to, benefit from corporate debate underwriting, his interest is personal. Finally, I note that the purpose of these FECA provisions was to prevent the potentially corrupting influence of corporate money in the electoral arena. See FEC v. National Right to Work Comm., 459 U.S. 197, 209 (1982) (reasoning that §441(b) of FECA reflects an "assessment of the dangers posed by [corporations] to the electoral process"). As a candidate who is trying to shed light on, as well as campaign within, a system in which corporations are permitted to do that which he insists violates the law, Nader falls well within the FECA's "zone of interest." Cf. FEC v. Akins, 524 U.S. 11, 18 (1998) (holding that voter plaintiffs satisfied "prudential standing" requirements because they fell within one of the "zones of interests" FECA was designed to address)

ii. The Organizational Plaintiffs.

As to the Nader 2000 Primary Committee, Association of State Green Parties, and Green Party USA, plaintiffs assert that the FEC's unlawful regulations impair these organizations' ability to achieve their basic political mission. To the extent that this is an abstract, ideological type of harm, it is insufficient. Courts insist that an organization must assert more than damage to its

social goals and interests. See e.g., Common Cause v. FEC, 108 F.3d 413, 417 (D.C. Cir. 1997) (holding that an organization suing on its own behalf must show a "'concrete and demonstrable injury to the organization's activities – with a consequent drain on the organization's resources'") (quoting Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 (1982)). However, as with Nader, the organizational plaintiffs are on stronger footing to the extent they cast their arguments in terms of the disadvantage they suffer in having to spend their own funds to get out Nader's message. The two major parties are relieved of that burden by virtue of the corporate money filtered through CPD. If Nader can raise "competitor standing," then his organization and party should be able to do the same.

iii. Individual Voters.

Under any theory, however, the injury asserted by the individual voters is too abstract, conjectural, or attenuated to meet the Allen test. First, to the extent that the voters seek to connect their injury to Nader and his candidacy, courts recognizing that harm to a candidate produces a derivative harm to voters also require that the voters themselves suffer a "concrete and personalized injury." Gottlieb, 143 F.3d at 622. Such an injury has been recognized where a candidate is prevented from appearing on a ballot altogether, see Bullock v. Carter, 405 U.S. 134, 143 (1972) (addressing high candidate filing fees) or when, for example, eligibility requirements or term limits

impinge on the voters' ability to support their candidate, see Thorsted v. Gregoire, 841 F. Supp. 1068, 1073 (W.D. Wash. 1994).

The argument plaintiffs make here, that Nader's relative disadvantage works a correlative injury to voters, is similar to one rejected in Buckley v. Valeo, where the voters tried to argue that the denial of public financing to some presidential candidates was restrictive of voters' rights. 424 U.S. 1, 94 (1976); see also Gottlieb, 143 F.3d at 108 ("The extra infusion of funds into the Clinton campaign did not impede the voters from supporting the candidate of their choice."). Even if Nader and his party have standing under a "political competitor" theory, it's too much of a stretch to sweep his voters in under that approach.

Plaintiffs also argue that the voters here suffer a direct injury. These arguments are weak. First, the idea that the voters' ability to influence the political process has been diminished, or that their votes have somehow been "diluted," was rejected by the Gottlieb court. See 143 F.3d at 621. Here, the plaintiffs' alleged injury is even more abstract: they claim they are harmed by the grubby influence of corrupt, corporate debate-staging money that they say distorts the political process or "tilts the electoral playing field." This is not particularized, personal, or concrete.

Second, invoking the Supreme Court's decision in Akins, the voters argue that they fall within the "zone of interests" that the FECA was

designed to protect. See 524 U.S. at 19-20. While this may be true, it puts the cart ahead of the horse. The APA did open the door to those "adversely affected or aggrieved by agency action," but it does not excuse a potential plaintiff from fulfilling the Article III standing requirements at the outset. Plaintiffs must still allege injury to a legally protected interest. See, e.g., Sierra Club v. Hickel, 433 F.2d 24, 32-33 (9th Cir. 1970) (holding that the APA, in and of itself, does not confer standing on a litigant; rather, it allows judicial review of administrative action where none existed before).

It is also worth noting that the complaint hints at a "right to receive information" type of injury, such as the one recognized in Akins. But, the injury-in-fact the Court found in Akins hinged on the denial of information which the statute required be made public. 524 U.S. at 20. The D.C. Circuit has subsequently limited "informational standing" to cases in which plaintiffs are denied information that is "both useful in voting and required by Congress to be disclosed." Common Cause, 108 F.3d at 418.

4. Preliminary Injunction Standard

Plaintiffs, as the moving party seeking a preliminary injunction, must meet four criteria before an injunction can issue. The Court must find: (1) that plaintiffs have exhibited a likelihood of success on the merits; (2) that plaintiffs will suffer irreparable injury if the injunction is not granted; (3) that such injury outweighs any harm

which granting injunctive relief would inflict on the defendants; and (4) that the public interest will not be adversely affected by the granting of the injunction. See Suarez-Cestero v. Pagan-Rosa, 172 F.3d 102, 104 (1st Cir. 1999); TEC Eng'g Corp. v. Budget Molders Supply, Inc., 82 F.3d 542, 544 (1st Cir. 1996). Plaintiffs bear the burden of making each of these showings. See International Ass'n of Machinists and Aerospace Workers v. Eastern Air Lines, Inc., 826 F.2d 1141, 1144-45 (1st Cir. 1987) (citing Planned Parenthood League of Mass. v. Bellotti, 641 F.2d 1006, 1009 (1st Cir. 1981)).

5. Likelihood of Success

a. Plain Language

Plaintiffs raise three arguments that the Debate Regulations are contrary to law. First, they assert that the Debate Regulations are inconsistent with the plain terms of the FECA, which proscribes the use of corporate money "in connection with" federal elections and which does not provide any exception for the use of corporate funds to stage federal candidate debates under § 441b(a). The FEC argues that the donation of corporate funds to underwrite candidate debates is permitted by the FECA because, in the general definition section, Congress exempted funds used for "nonpartisan activity designed to encourage individuals to vote or to register to vote" from the definition of expenditure. Relying heavily on the basic principle of statutory construction that a specific statute controls over a general provision,

see HCSC-Laundry v. United States, 450 U.S. 1, 6 (1981), plaintiffs respond that the specific prohibitions in § 441b(b)(2) trump the general exemptions in § 431(a)(B)(ii). The FEC retorts that the sections should be read in tandem.

An analysis of FEC v. Massachusetts Citizens For Life, Inc., 479 U.S. 238 (1986) ("MCFL") persuades me that the FEC has the better argument. There, an anti-abortion organization had issued a "special edition" newsletter which encouraged readers to vote for certain candidates. MCFL had argued that it did not violate the FECA because it did not provide anything to any candidate or organization, and § 441b(b)(2) narrowly defined "contribution or expenditure" to include the provision of various things of value to a candidate, campaign committee or political party in connection with any election. The Supreme Court rejected that analysis by looking to the general definition section of the Act which contained a "broader definition" of expenditure in §431(9)(A)(i), which covers anything of value made "for the purpose of influencing any election for Federal office." The Supreme Court concluded: "Since the language of the statute does not alone resolve the issue, we must look to the legislative history of Section 441b to determine the scope of the term 'expenditure.'" Id. at 246. In order to discern legislative intent, the Court parsed the remarks of the provision's sponsor as well as other congressional remarks, and found no merit in the argument that "only payments to a candidate or or-

ganization fall within the scope of § 441b." Id. at 248.

Here, too, the interplay between the specific prohibitions in § 441b(b) and the general definitions in § 431 creates an ambiguity which the plain language of the statute does not resolve. Again, following the MCFL lead, I look to the legislative history to resolve the dispute. The Conference Report clarifies that the two provisions are to be read together to permit corporations to take part in nonpartisan get-out-the-vote activities if such activities are jointly sponsored by the corporation and an organization that does not endorse candidates, and are conducted by that organization.

b. Gap-filling

This statutory construction is only one step forward in resolving this dispute because, as each party acknowledges, neither the statute nor the legislative history specifically mentions the issue of federal candidate debates. Plaintiffs stress that even if § 431 amplifies the permissible range of corporate expenditures, the FECA does not allow corporate funds to be used for candidate debates, which may be educational, but are not a get-out-the-vote activity. In its rule making, the FEC asserted that candidate debates might "stimulate voter interest and hence 'encourage individuals to register to vote or to vote,'" 44 Fed. Reg. at 76,736, and that "[t]he educational purpose of nonpartisan public candidate debates is similar to the purpose underlying nonpartisan voter regis-

tration and get-out-the-vote campaigns." 44 Fed. Reg. at 39,348. Plaintiffs disagree, pointing out that even the much-heralded Conference Report's example of get-out-the vote activities is "assisting eligible voters to register and to get to the polls." H.R. Rep. No. 1057, at 63 (1976).

Judicial review of the validity of an agency's construction of a statute entails a bifurcated analysis. See Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984). Under Chevron, if a court determines that "Congress has directly spoken to the precise question at issue," then "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." 467 U.S. at 842-43. If however, the agency's statutory interpretation "fills a gap or defines a term in a way that is reasonable in light of the legislature's revealed design, we give [that] judgment 'controlling weight.'" Id. at 844. "[I]f it is a reasonable interpretation and implementation of an ambiguous statutory provision, it must be given judicial deference." United States v. Haggar Apparel Co., 526 U.S. 380, 383 (1999) (involving a customs regulation). Because "Congress need not, and likely cannot, anticipate all circumstances in which a general policy must be given specific effect", Congress may authorize agencies "to issue rules so that its statutes may be applied to unforeseen situations and changing circumstances in a manner consistent with Congress' general intent." Id. at 392-93.

The Supreme Court has held that the FEC is "precisely the type of agency to which deference should presumptively be afforded." FEC v. Democratic Senatorial Campaign Committee, 454 U.S. 27, 37 (1981) (upholding the FEC's view that agency agreements between the National Republican Senatorial Committee and the state committees were logically consistent with legislative intent, although Congress failed to explicitly provide for such arrangements). Hence, in determining whether the FEC's action is "contrary to law," the task for the reviewing court is not to interpret the statute as it thinks best but rather to undertake the narrower inquiry into whether the FEC's construction was "sufficiently reasonable" to be accepted by the reviewing court. Id. at 39 (citing Train v. Natural Resources Defense Council, 421 U.S. 60, 75 (1975)).

Of course, judicial deference is not tantamount to judicial abdication. While the interpretation of the statute by the agency charged with administering it is entitled to deference, the courts must "reject administrative constructions of the statute, whether reached by adjudication or by rule-making, that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement." Id. at 32. In analyzing whether the agency's interpretation is consistent with legislative intent, the Supreme Court has looked at various factors: when the FEC submitted the regulation to Congress,

whether either house expressed disapproval;[5] whether the statute "expressly or by implication" forbids the disputed practice; whether the legislative history of the FECA "purports to disapprove" the disputed practice; whether the agency's interpretation was "logically consistent" with the FECA; whether the interpretation is inconsistent with "any discernible purpose of the Act." Id. at 34-36.

Looking at these factors, I conclude that the FEC's longstanding and consistent interpretation of the FECA is sufficiently reasonable to pass muster. First, when the Debate Regulations were submitted to Congress, neither House expressed disapproval. Second, nothing in the legislative history of the Act since the regulations were initially implemented twenty years ago suggests a legislative disapproval of – or even queasiness with – corporate funding of nonprofit, nonpartisan corporations which sponsor debates. The presidential debates in 1988, 1992, and 1996, which were sponsored by the CPD, were hardly a secret. Third, the FECA neither explicitly nor by implication addresses the funding of debates involving candidates for federal office. Fourth, permitting a

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[5] It is unclear whether this factor can still be given much weight, after the 1996 passage of the Small Business Regulatory Enforcement Fairness Act. See 5 U.S.C. § 801(g) (precluding a court from inferring any intent of Congress from any inaction by Congress after an agency's submission of a proposed rule). This act did not go into effect until March 29, 1996.

nonpartisan corporation funded by corporations and labor unions to sponsor debates which will educate voters and spark enough interest to motivate them to vote or to register to vote is fully consistent with the express legislative intent to permit nonpartisan organizations to get-out-the-vote and encourage voter registration. See H.R. Rep. No. 94-1057, at 63-64. Nader himself has recognized the power of debates to stimulate citizens to vote:

> Televised presidential debates shouldn't be a cure for insomniacs. They should stimulate study, reflection, talk and voting among Americans. These citizens might begin to believe that they can take charge of their country, just as Thomas Jefferson and our other distinguished forebears envisioned would occur some day when they signed on to "We the People."

Ralph Nader, A Real Debate Requires All the Candidates, Wall St. J., Aug. 25, 2000, at A14.

Fifth, the FEC'S interpretation is not inconsistent with "the primary purpose served by the Act," which the Supreme Court has stated is "the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office." Democratic Senatorial Campaign Comm., 454 U.S. at 47. Plaintiffs sincerely

point to the "compelling governmental interest in preventing corruption [which] support[s] the restriction of the influence of political war chests funneled through the corporate form." Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 659 (1990). However, Congress took this precise interest into account by requiring that any such corporate expenditure must be in connection with a "nonpartisan activity designed to encourage individuals to vote or to register to vote." 2 U.S.C. § 431(9) (B) (ii). Accordingly, I find that the Debate Regulations are reasonable gap-fillers.

c. Nonpartisan vs. Bipartisan

Finally, plaintiffs argue that the Debate Regulations are contrary to law because they do not provide that the debates will be "nonpartisan" within the meaning of the FECA, and they disparage the FEC's assertion that by restricting staging organizations to certain nonprofit corporations, it has provided "sufficient safeguards to insure nonpartisanship." 44 Fed. Reg. at 76736. 11 C.F.R. § 13 provides that staging organizations must be nonprofit organizations described in 26 U.S.C. § 501(c) (3) or (c) (4) which do not "endorse, support or oppose political candidates or political parties." The FEC also points out that it requires "[s]taging organizations . . . to be able to show that their objective criteria were used to pick the participants, and that the criteria were not designed to result in the selection of certain pre-chosen participants."

Still, plaintiffs insist that the proof is in the pudding because recent presidential and vice-presidential debates have been controlled by the CPD, which they claim is a bipartisan, not a nonpartisan, organization created to promote the interests of two major political parties. Their concern is not without some foundation because the CPD is chaired by the respective former chairmen of the Democratic and Republican National Committees, Paul G. Kirk, Jr. and Frank J. Fahrenkopf, Jr., and the CPD was created by a joint initiative of the two parties, and incorporated by them. Nonetheless, the CPD points out that Kirk and Fahrenkopf no longer serve as the chairs of the major national party committees, that the current major party chairs do not sit on the Board of Directors, and that no CPD Board member is an officer of the Democratic or Republican National Committee.

Janet H. Brown, the Executive Director of the CPD, states that, prior to the first debate, the CPD formed an advisory panel which included individuals not affiliated with any party to provide guidance to the CPD with respect to several areas including non-major party candidate participation in CPD-sponsored debates. As proof of nonpartisanship, she points out that Ross Perot was permitted to debate in 1992. She states:

> In 1988, 1992 and 1996, the CPD's decisions regarding which candidates to invite to its debates were made by the CPD Board's unanimous adoption

> of the recommendations of independent Advisory Committees charged with the task of applying the CPD's preestablished, objective criteria. At no time did any campaign or representative of any campaign have a role in the Advisory Committees' or the CPD Board's decision-making process.

(Brown Aff. ¶ 39.) This year, the CPD has adopted "objective criteria" which mandate, among other things, that candidates must have a level of support of at least fifteen per cent as determined by five national polling organizations.

Any complaint that a debate staging organization is in fact acting in a bipartisan, rather than a nonpartisan, way, in violation of the FECA, must be submitted to the FEC pursuant to 2 U.S.C. § 437g(a) (8). However, plaintiffs have not established that the regulations are invalid as a matter of law.

6. Harm Balancing

Because I find no likelihood of success on the merits, there is no need to spend much time balancing the harm to the plaintiffs against the harm to the public. Plaintiffs argue that Ralph Nader, his supporters, and the Green Party will suffer irreparable harm if corporations are allowed to make illegal corporate contributions to pay for the debates. They say: "By allowing corporate money to distort the electoral process, the

FEC assists corporations and the major parties in stifling the voice of alternative parties and stunting the opportunities of alternative candidates such as Mr. Nader." If the corporate contributions to the CPD turn out to be illegal, plaintiffs are correct that any harm to the electoral process is irreparable in the sense that there is no remedy after the election.

On the other side of the equation, however, is the harm to the public interest posed by this late challenge to these regulations which were enacted a score of years ago.[6] Plaintiffs concede that if I invalidate the regulations, they will be at some courthouse door seeking an order to stop the CPD's scheduled debates.[7] While plaintiffs

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[6] As amicus, the CPD argues that the First Amendment protects its ability to stage debates and also to choose debate participants. See Perot v. FEC, 97 F.3d 553, 559 (D.C. Cir. 1996) ("[I]f this court were to enjoin the CPD from staging the debates or from choosing debate participants, there would be a substantial argument that the court would itself violate the CPD's First Amendment rights."). The Court need not resolve that question, which was inadequately briefed by the parties.

[7] The FEC argues that a court would have no authority to issue a preliminary injunction to stop the debates even if the debates were illegally funded because of agency exhaustion requirements. However, "extraordinary circumstances" may enable a party to circumvent the explicit time restraints of the FECA. See Perot, 97 F.3d at 558; cf. Sampson v. Murray, 415 U.S. 61, 83 (1974) (permitting injunctions against government from dismissing a civil service employee who had not exhausted her remedies where there was a very strong showing of irreparable injury); Skubel,

(continued...)

argue that inevitably there will be debates in some forum held by some group (like the media), the down-to-the-wire jockeying over funding, sponsorship and format is likely to imperil the viability of any presidential and vice-presidential debates. As the Supreme Court stated, "in our tradition, candidate debates are of exceptional significance in the electoral process." Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666, 675-76 (1998). The balance of harms militates against a preliminary injunction.

ORDER

The Court **DENIES** the Motion to Dismiss (Docket No. 14) and the Motion for Preliminary Injunction (Docket No. 2). The parties shall inform the court in fifteen (15) days whether the Court should enter final judgment based on the current record.

/s/
PATTI B. SARIS
UNITED STATES DISTRICT JUDGE

(continued...)

113 F.3d at 334 (holding that exhaustion is excused where it would result in irreparable harm).

APPENDIX C

Title 2. The Congress
Chapter 14 – Federal Election Campaigns
Subchapter I – Disclosure of Federal Campaign Funds

2 U.S.C. § 431 (1997)

§ 431. Definitions.

When used in this Act:

* * *

(9)(A) The term "expenditure" includes –

(i) any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office; and

(ii) a written contract, promise, or agreement to make an expenditure.

(B) The term "expenditure" does not include –

* * *

(ii) nonpartisan activity designed to encourage individuals to vote or to register to vote; . . .

Title 2. The Congress
Chapter 14 – Federal Election Campaigns
Subchapter 1 – Disclosure of Federal Campaign Funds

2 U.S.C. § 441b (1997)

§ 441b. Contributions or expenditures by national banks, corporations, or labor organizations.

(a) It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank or labor organization, as the case may be, prohibited by this section.

Title 2. The Congress
Chapter 14 – Federal Election Campaigns
Subchapter 1 – Disclosure of Federal Campaign Funds

2 U.S.C. § 441b (1997)

§ 441b. Contributions or expenditures by national banks, corporations, or labor organizations.

(b)(2) For purposes of this section and section 79*l*(h) of Title 15, the term "contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section, but shall not include (A) communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject; (B) nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families, or by a labor organization aimed at its members and their families; and (C) the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a cor-

poration, labor organization, membership organization, cooperative, or corporation without capital stock.

Code of Federal Regulations
Title 11 – Federal Elections
Chapter I – Federal Election Commission
Subchapter A – General
Part 110 – Contribution and Expenditure Limitations and Prohibitions

11 C.F.R. § 110.13 (1999)

§ 110.13 Candidate debates.

(a) *Staging organizations.* (1) Nonprofit organizations described in 26 U.S.C. 501(c)(3) or (c)(4) and which do not endorse, support, or oppose political candidates or political parties may stage candidate debates in accordance with this section and 11 CFR 114.4(f).

(2) Broadcasters (including a cable television operator, programmer or producer), *bona fide* newspapers, magazines and other periodical publications may stage candidate debates in accordance with this section and 11 CFR 114.4(f), provided that they are not owned or controlled by a political party, political committee or candidate. In addition, broadcasters (including a cable television operator, programmer or producer), *bona fide* newspapers, magazines and other periodical publications, acting as press entities, may also cover or carry candidate debates in accordance with 11 CFR 100.7 and 100.8.

(b) *Debate structure.* The structure of debates staged in accordance with this section and 11 CFR 114.4(f) is left to the discretion of the staging organizations(s), provided that:

(1) Such debates include at least two candidates; and

(2) The staging organization(s) does not structure the debates to promote or advance one candidate over another.

(c) *Criteria for candidate selection.* For all debates, staging organization(s) must use preestablished objective criteria to determine which candidates may participate in a debate. For general election debates, staging organizations(s) shall not use nomination by a particular political party as the sole objective criterion to determine whether to include a candidate in a debate. For debates held prior to a primary election, caucus or convention, staging organizations may restrict candidate participation to candidates seeking the nomination of one party, and need not stage a debate for candidates seeking the nomination of any other political party or independent candidates.

Code of Federal Regulations
Title 11 – Federal Elections
Chapter I – Federal Election Commission
Subchapter A – General
Part 114 – Corporate and Labor Organization Activity

11 C.F.R. § 114.4(f) (1999)

§ 114.4(f) *Candidate debates.* (1) A nonprofit organization described in 11 CFR 110.13(a)(1) may use its own funds and may accept funds donated by corporations or labor organizations under paragraph (f)(3) of this section to defray costs incurred in staging candidate debates held in accordance with 11 CFR 110.13.

(2) A broadcaster (including a cable television operator, programmer or producer), *bona fide* newspaper, magazine or other periodical publication may use its own funds to defray costs incurred in staging public candidate debates held in accordance with 11 CFR 110.13.

(3) A corporation or labor organization may donate funds to nonprofit organizations qualified under 11 CFR 110.13(a)(1) to stage candidate debates held in accordance with 11 CFR 110.13 and 114.4(f).

Supreme Court, U.S.
FILED
MAR 29 2001
CLERK

(2)

No. 00-1244

In the Supreme Court of the United States

RALPH NADER, ET AL., PETITIONERS

v.

FEDERAL ELECTION COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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Washington, D.C. 20463

QUESTION PRESENTED

The Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. 431 *et seq.*, imposes various restrictions on the manner in which campaigns for federal office may be financed. Pursuant to statutory authority, the Federal Election Commission (FEC) has promulgated regulations, see 11 C.F.R. 110.13, 114.4(f), that allow corporations to donate funds to a nonprofit staging organization to help defray the costs of conducting debates among competing federal candidates. The question presented is as follows:

Whether the challenged FEC regulations reflect a permissible construction of the FECA.

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In the Supreme Court of the United States

No. 00-1244

RALPH NADER, ET AL., PETITIONERS

v.

FEDERAL ELECTION COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-57a) is reported at 230 F.3d 381. The opinion of the district court (Pet. App. 58a-91a) is reported at 112 F. Supp. 2d 172.

JURISDICTION

The judgment of the court of appeals was entered on November 1, 2000. The petition for a writ of certiorari was filed on January 30, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case presents a statutory challenge to regulations promulgated pursuant to the Federal Election

Campaign Act of 1971 (FECA or Act), 2 U.S.C. 431 *et seq.*, concerning the manner in which debates among candidates for federal office may be sponsored and financed. The challenged "debate regulations," 11 C.F.R. 110.13, 114.4(f), allow corporations and labor organizations to donate funds to certain nonprofit organizations to stage candidate debates. Petitioners contend that the regulations are inconsistent with FECA's general prohibition on corporate and union contributions and expenditures in support of candidates for federal office.

1. The FECA provides that "[i]t is unlawful * * * for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election" for federal office. 2 U.S.C. 441b(a). The Act defines the term "contribution" to include "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. 431(8)(A)(i). The term "expenditure" is defined to include "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. 431(9)(A)(i). The definition of "expenditure" specifically excludes, *inter alia*, "nonpartisan activity designed to encourage individuals to vote or to register to vote." 2 U.S.C. 431(9)(B)(ii). Section 441b also identifies three categories of disbursements that are specifically excluded, for purposes of Section 441b itself, from the term "contribution or expenditure." See 2 U.S.C. 441b(b)(2). One of those categories is "nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families, or by a

labor organization aimed at its members and their families." 2 U.S.C. 441b(b)(2)(B).

2. In 1979, the Federal Election Commission (FEC or Commission) promulgated regulations defining the circumstances under which corporations and labor unions may participate in the staging and financing of debates among competing candidates for federal office. See 11 C.F.R. 110.13, 114.4(f). Only a nonprofit organization under 26 U.S.C. 501(c)(3) or 26 U.S.C. 501(c)(4) (1994 & Supp. IV 1998) that "do[es] not endorse, support, or oppose political candidates or political parties[,]" 11 C.F.R. 110.13(a)(1), or a media entity "not owned or controlled by a political party, political committee or candidate[,]" 11 C.F.R. 110.13(a)(2), is permitted to stage a candidate debate. A debate must "include at least two candidates" and the staging organization may not "structure the debates to promote or advance one candidate over another." 11 C.F.R. 110.13(b). Staging organizations "must use preestablished objective criteria to determine which candidates may participate in a debate," and for general election debates the organization "shall not use nomination by a particular political party as the sole objective criterion to determine whether to include a candidate in a debate." 11 C.F.R. 110.13(c).

The debate regulations permit corporations and labor organizations to donate funds to a nonprofit staging organization to help defray the costs of staging the debate. 11 C.F.R. 114.4(f)(1) and (3). Donations authorized by Section 114.4(f) are also expressly excluded from the general regulatory definitions of "contribution" and "expenditure." See 11 C.F.R. 100.7(b)(21)

("contribution"); 11 C.F.R. 100.8(b)(23) ("expenditure").[1]

3. Petitioners in this case are presidential candidate Ralph Nader, his authorized campaign committee, and the political party under whose auspices Nader competed in the year 2000 presidential campaign. Petitioners filed suit against the FEC in federal district court, alleging that the Commission's debate regulations are inconsistent with the FECA insofar as they allow business corporations to contribute money to the

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[1] Pursuant to 2 U.S.C. 438(d), the Commission first submitted proposed debate regulations to Congress on June 28, 1979. See 44 Fed. Reg. 39,348. Approximately three months later, the Senate adopted a resolution disapproving those proposed regulations. See 125 Cong. Rec. 24,958 (1979). "[W]hen the Senate rejected the initial proposal, the floor statements of the resolution's cosponsors indicated that the Senate was concerned that the initial proposed regulations were too intrusive and burdensome on debate sponsors, not too permissive in allowing corporate sponsorship of debates." Pet. App. 34a n.17. Senator Pell, a sponsor of the disapproval resolution, stated that "any regulation which could be interpreted as being burdensome to organizations which are likely to sponsor candidate debates, or which could in any way impede the heretofore successful debate procedure that has evolved through direct arrangements made between sponsors and candidates should not be allowed to take effect." 125 Cong. Rec. 24,957 (1979). He expressed particular concern that the proposed regulations would have precluded broadcast and print media entities from sponsoring candidate debates. *Ibid.*

On December 20, 1979, the Commission submitted to Congress the revised debate regulations that are the subject of this case. 44 Fed. Reg. 76,734-76,735. Congress did not pass any resolution of disapproval concerning those regulations, which became effective on April 1, 1980. See 45 Fed. Reg. 21,210. The debate regulations were revised in 1995 in several respects unrelated to the question presented in the petition for certiorari. See 60 Fed. Reg. 64,260-64,279.

Commission on Presidential Debates (CPD) for use in staging presidential debates. See C.A. App. 9-19 (complaint); Pet. App. 59a. The complaint further alleged that "[petitioner] Nader is harmed and aggrieved by the FEC's Debate Regulations because the regulations permit illegal corporate money to be used to support debates between major party candidates that exclude independent and third party candidates. These debates corrupt the political process, undermine [petitioner] Nader's campaign for the presidency and deny Nader his right fairly to compete for the presidency on a level playing field." C.A. App. 16.

The district court entered final judgment on the merits in favor of the Commission, holding that the challenged regulations reflect a permissible interpretation of the FECA. Pet. App. 58a-91a; C.A. App. 250 (judgment). The court held that petitioners had standing to sue, essentially on the theory that the Democratic and Republican candidates for President would receive a competitive advantage over petitioner Nader as a result of the corporate-funded publicity provided by the CPD debates. Pet. App. 70a-77a.[2] On the merits, the court held that petitioners had failed to establish a likelihood of success on their claim that the challenged regulations are inconsistent with the FECA. *Id.* at 80a-91a. Pursuant to a stipulation between the parties, the district court subsequently entered final

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[2] The plaintiffs in the district court also included individual voters. The district court held that those plaintiffs lacked standing to sue, see Pet. App. 77a-79a, and the court of appeals reached the same conclusion, see *id.* at 17a-19a. Those plaintiffs are not petitioners in this Court, see Pet. ii, and their standing is therefore no longer at issue.

judgment in favor of the Commission on the basis of its earlier opinion. C.A. App. 250.

4. The court of appeals affirmed. Pet. App. 1a-57a.

a. The court held that petitioners had established standing to sue under the standards announced in its prior decision in *Vote Choice, Inc.* v. *DiStefano*, 4 F.3d 26 (1st Cir. 1993). The court observed that "[a]t the time that [petitioners] brought this suit, Nader still stood a chance of being invited to participate in the debates," Pet. App. 7a, and it stated that the question of standing should be resolved on the basis of the facts as they existed at the time the complaint was filed, see *id.* at 8a-9a n.3. The court accepted petitioners' argument that they had adequately alleged a competitive injury on the ground that "given Nader's choice not to accept corporate contributions, the FEC's regulations allowing corporate sponsorship of the debates effectively bar him from participating even if he qualifies for an invitation." *Id.* at 8a; see *id.* at 15a ("By allowing corporate sponsorship of the debates, the regulations threatened to force Nader to decline an invitation to participate in the debates, and that threat affected the conduct of his campaign.").

b. The court of appeals sustained the challenged debate regulations as resting on a permissible interpretation of the FECA. The court held that the Commission's construction of the Act is entitled to deference under the principles announced in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The court explained that "it is not clear on the face of the [FECA] definitions of 'contribution' and 'expenditure' that corporate disbursements to nonpartisan debate staging organizations even fall within the scope of the Act's coverage," Pet. App. 28a-29a, and further explained that the "statutory phrase 'non-

partisan activity designed to encourage individuals to vote or register to vote' at Section 431(9)(B)(ii) gives the Commission some leeway to interpret the term 'activity' and to decide which activities so 'encourage' people," *id.* at 30a. The court of appeals also explained that "Congress intended to delegate broad policymaking discretion to the FEC," *id.* at 29a (citing 2 U.S.C. 437), and it found that the Act's legislative history and "Congress's apparent acquiescence in the regulations under the 'report and wait' requirements of the FECA" support the Commission's interpretation, *id.* at 30a-34a. While acknowledging that "[petitioners'] interpretation of the FECA is also not unreasonable," the court of appeals sustained the challenged regulations on the ground that "Congress gave the choice as to the preferred reasonable interpretation to the FEC." *Id.* at 36a-37a.

c. Chief Judge Torruella filed a separate concurring opinion. Chief Judge Torruella agreed that the district court had acted properly in dismissing the suit, but he would have based that disposition on the grounds that petitioners lack standing and that the case has become moot. He explained that because petitioner Nader was not invited to participate in the CPD debates, he was not subjected to any "coercive choice" as a result of the Commission's decision to permit corporate financial support of those debates. Pet. App. 43a-44a. Chief Judge Torruella also rejected petitioners' effort to establish standing on the theory "that the corporate contributions to the CPD impermissibly help his competitors, essentially providing Gore and Bush with inexpensive access to extensive media coverage." *Id.* at 49a. He explained that while the sponsoring corporations and/or the CPD might plausibly be regarded as the beneficiaries of the challenged regulations, peti-

tioners do not compete against those entities and therefore could not establish standing on a competitive-injury theory. *Id.* at 52a-53a.

ARGUMENT

The court of appeals correctly rejected petitioners' challenge to the FEC regulations governing corporate funding of candidate debates. The court's decision does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.[3]

1. The court of appeals correctly accorded deference to the Commission's regulatory approach under the principles announced in *Chevron*. Neither the definitional provisions of 2 U.S.C. 431(8) and (9), nor the restrictions on corporate and union campaign spending contained in 2 U.S.C. 441b, unambiguously resolve the question whether a corporate or union disbursement to a nonprofit organization to defray the costs of staging debates among competing candidates is a prohibited "contribution" or "expenditure." The FECA is therefore ambiguous with respect to "the precise question at issue" in this case. *Pension Benefit Guaranty Corp.* v. *LTV Corp.*, 496 U.S. 633, 647 (1990) (quoting *Chevron*, 467 U.S. at 842-843). Congress vested the Commission with broad authority to promulgate rules "to carry out the provisions of [the FECA]," 2 U.S.C. 438(a)(8), and to "formulate policy" with respect to the Act. 2 U.S.C. 437c(b)(1). Accordingly, this Court has long recognized that the FEC is "precisely the type of agency to which deference should presumptively be afforded." *FEC* v.

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[3] Although we agree with the court of appeals that petitioners' statutory challenge lacks merit, we continue to believe—essentially for the reasons stated in Chief Judge Torruella's concurring opinion—that petitioners lack standing to sue.

Democratic Senatorial Campaign Comm. (DSCC), 454 U.S. 27, 37 (1981).

2. Petitioners contend (Pet. 9) that the court of appeals' "approach to the review of an agency's statutory interpretation is in conflict with a number of recent decisions by the D.C. Circuit that illustrate the proper application of *Chevron*." That claim is without merit. The decisions on which petitioners rely simply recognize that an administrative agency ordinarily lacks power to announce exceptions to a facially unqualified and unambiguous statutory command. See *American Bus Ass'n* v. *Slater*, 231 F.3d 1, 4 (D.C. Cir. 2000) ("Congress unambiguously intended to preclude [the Department of Transportation] from authorizing money damages" because the statute's "carefully crafted remedies scheme reveals" the legislative "intent to deny agencies the power to authorize supplementary monetary relief"); *Backcountry Against Dumps* v. *EPA*, 100 F.3d 147, 151 (D.C. Cir. 1996) ("[T]he statute here is neither silent nor ambiguous. It is quite clear."); *Ethyl Corp.* v. *EPA*, 51 F.3d 1053, 1058 (D.C. Cir. 1995) ("The language of the provision * * * is specific and definite.").

In the instant case, the court of appeals did not suggest that the FEC has power to announce an extra-statutory *exception* to the FECA ban on corporate and union "contributions" and "expenditures" in support of federal candidates. Rather, the court recognized that the FECA does not clearly resolve the question whether the disbursements at issue here constitute "contributions" or "expenditures" within the meaning of the Act, and that the Commission's resolution of that

interpretive question is therefore entitled to deference.[4] See Pet. App. 28a-29a ("[I]t is not clear on the face of the definitions of 'contribution' and 'expenditure' that corporate disbursements to nonpartisan debate staging organizations even fall within the scope of the Act's coverage in the first instance."). That holding is fully consistent with District of Columbia Circuit precedent. Any difference in outcomes between the pertinent District of Columbia Circuit cases and the decision below reflects not a fundamentally different approach to *Chevron*, but the difference between the FECA and the statutes considered by the District of Columbia Circuit.[5]

3. The court of appeals correctly found that the Commission's debate regulations reflect a permissible construction of the FECA. The primary purpose of

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[4] Contrary to petitioners' assertion (Pet. 9 n.4), the Commission has consistently taken the position, both in its rulemaking and in its brief in the court of appeals, that Section 441b is ambiguous as to whether a corporate or union donation to help defray costs of a debate among competing candidates is properly regarded as a "contribution" or "expenditure" within the meaning of that provision. See Pet. App. 27a & n.16.

[5] Indeed, when the District of Columbia Circuit confronted the FECA, it held that the terms "contribution" and "expenditure" in Section 441b are ambiguous, and has deferred to the Commission's determination that a corporate donation to a picnic at which an incumbent candidate addressed constituents was not a corporate "contribution" prohibited by Section 441b. *Orloski* v. *FEC*, 795 F.2d 156, 161-167 (D.C. Cir. 1986); cf. *Common Cause* v. *FEC*, 842 F.2d 436, 445, 448 (D.C. Cir. 1988) (noting "the enormous subtleties and complexities inherent in the FECA's first-amendment-sensitive regime," and explaining that "[d]eference is particularly appropriate in the context of the FECA, which explicitly relies on the bipartisan Commission as its primary enforcer") (citation and internal quotation marks omitted).

Section 441b is to prevent the use of corporate and labor union treasury funds "amassed in the economic marketplace" in ways that would "provide an unfair advantage in the political marketplace." *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 257 (1986). Section 441b "permits some participation of unions and corporations in the federal electoral process," *FEC* v. *National Right to Work Comm.*, 459 U.S. 197, 201 (1982), however, because neither Section 441b, nor the general definitions of "contribution" and "expenditure" contained in 2 U.S.C. 431(8) and (9), encompass every corporate or union disbursement having a conceivable effect on a federal election.

In 1974, Congress amended the Act to exclude "nonpartisan activity designed to encourage individuals to vote or to register to vote" from the Act's general definition of "expenditure." 2 U.S.C. 431(9)(B)(ii). In 1976, Congress incorporated into the Act, as 2 U.S.C. 441b, the long-standing prohibition of corporate contributions and expenditures previously codified at 18 U.S.C. 610. Section 441b includes a provision stating that, for purposes of that Section, the term "'contribution or expenditure' shall include" certain uses of money, "but shall not include" three activities, one of which is "nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families, or by a labor organization aimed at its members and their families[.]" 2 U.S.C. 441b(b)(2)(B). The Conference Report accompanying the 1976 legislation explained the relationship between that provision and the exemption from the general definition of "expenditure" for "nonpartisan activity designed to encourage individuals to vote or to register to vote" contained in 2 U.S.C. 431(9)(B)(ii):

> The conferees' intent with regard to the interrelationship between sections [431(9)(B)(ii)] and [441b(b)(2)(B)] which permit such activities as assisting eligible voters to register and to get to the polls, so long as these services are made available without regard to the voter's political preference, is the following: these provisions should be read together to permit corporations both to take part in nonpartisan registration and get-out-the-vote activities that are not restricted to stockholders and executive or administrative personnel, if such activities are jointly sponsored by the corporation and an organization that does not endorse candidates and are conducted by that organization; and to permit corporations, on their own, to engage in such activities restricted to executive or administrative personnel and stockholders and their families. The same rule, of course, applies to labor organizations.

H.R. Conf. Rep. No. 1057, 94th Cong., 2d Sess. 63-64 (1976).

In 1979, the Commission conducted a rulemaking to address the application of the FECA to the funding and sponsorship of candidate debates.[6] The Commission

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[6] As we explain above (see note 1, *supra*), the Commission in 1979 promulgated two versions of the debate regulations. The Senate passed a resolution of disapproval as to the initial regulations, apparently on the ground that those rules would have precluded sponsorship of candidate debates by media entities. Both versions of the debate regulations permitted corporations and labor organizations to donate money to nonprofit staging organizations for use in conducting candidate debates. The fact that Congress did not disapprove the second version of the regulations, after the rules had been revised in response to the Senate disapproval resolution, "indicat[es] that Congress [did] not look

determined that "[b]ecause nonpartisan public candidate debates are similar in nature and purpose to registration and [get-out-the-]vote activity, * * * corporations and labor organizations are permitted to donate funds to nonprofit organizations qualified to stage debates." 44 Fed. Reg. 76,735 (1979). The FEC explained:

> Congress expressly indicated an intent to permit corporations and labor organizations to participate in nonpartisan activity aimed at encouraging voter participation where that activity was undertaken in conjunction with a nonpartisan nonprofit organization. Permitting corporations and labor organizations to donate funds to nonpartisan nonprofit organizations for the purpose of staging nonpartisan candidate debates furthers that express congressional intent. Candidate debates stimulate voter interest and hence "encourage individuals to register to vote or to vote." Inasmuch as candidate debates are in the public interest and encourage educated voter involvement, permitting corporations and labor organizations to donate funds to nonprofit nonpartisan organizations for their staging is consistent with congressional intent and policy.

Id. at 76,736. As the Commission observed in announcing the initial version of the debate regulations, "[u]nlike single candidate appearances, nonpartisan public debates are designed to educate and inform voters rather than to influence the nomination or election of a particular candidate. Hence, funds received and

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unfavorably" upon the provisions dealing with corporate disbursements to nonprofit staging organizations. *DSCC*, 454 U.S. at 34.

expended [by certain nonprofit organizations] to defray costs incurred in sponsoring nonpartisan public debates are not considered contributions or expenditures under the Act." *Id.* at 39,348.

The Commission also explained that "the prohibitions of 2 U.S.C. § 441b were not specifically aimed at the donation of corporate or union funds to a nonpartisan tax exempt organization." 44 Fed. Reg. at 39,350. It noted that the definition of "contribution or expenditure" in Section 441b(b) addresses payments "to any *candidate, campaign committee or political party or organization.*" *Ibid.* Because debate-staging organizations are required by the regulations to have "a history of nonpartisanship," and are prohibited by the Internal Revenue Code "from intervening in any political campaign on behalf of any candidate for public office," an "organization qualified to sponsor candidate debates would be neither a campaign committee, a political party nor a political organization referred to in 2 U.S.C. § 441b." *Ibid.*

The debate regulations at issue in this case are thus consistent with the text and purposes of the FECA. Although this Court has upheld certain restrictions on corporate campaign spending because of the special risks inherent in the corporate form, those compelling governmental interests do not require the Commission to adopt the most restrictive interpretation possible regarding corporate financial assistance to nonprofit, nonpartisan debate-sponsoring organizations. In sum, "Congress gave the choice as to the preferred reasonable interpretation to the FEC," Pet. App. 37a (and, to the extent it indicated a preference for any approach, favored the FEC's current interpretation, see note 6, *supra*). Accordingly, the court of appeals correctly

rejected petitioners' statutory challenge to the Commission's debate regulations.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEDERAL ELECTION COMMISSION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

Petitioners submit this reply brief to address important misconceptions of law and fact in the respondent FEC's opposition brief. First, the FEC is wrong when it asserts that the exemption in 2 U.S.C. § 431(a)(B)(ii), which excludes support of *public* "nonpartisan activity designed to encourage individuals to vote or to register to vote" from the general definition of "expenditures" regulated by the FECA, displaces the specific exemption in 2 U.S.C. § 441b(b)(2)(B), which permits the use of corporate funds only for *internal* "get-out-the-vote campaigns." Second, the FEC is wrong when it claims that candidate debates, which serve as forums for the solicitation of votes, are "similar" to nonpartisan activities designed to encourage individuals to vote and, therefore, may be sponsored by business corporations.

1. The First Circuit should have followed the basic principle of statutory construction "that a specific statute ... controls over a general provision ... particularly when the two are interrelated and closely positioned." *See HCSC-Laundry* v. *United States*, 450 U.S. 1, 6 (1981) (holding that a general exemption in the federal income tax statute was not applicable to the plaintiff hospital services organization because the income tax statute also set out specific exemptions relating to hospital service organizations). If it had done so, the Court of Appeals properly would have found that the narrow exemption in § 441b(b)(2)(B) is controlling. That provision only allows corporations to sponsor "get-out-the-vote campaigns" that are

aimed at their own stockholders and personnel. Section 441b(a) otherwise unambiguously prohibits such corporate contributions or expenditures in connection with any federal election, including corporate sponsorship of nationally televised candidate debates.

It is no answer to assert, as the Court of Appeals did, that the definitions of "contribution" and "expenditure" are flexible because Congress "defined them to 'include' certain uses and phrased the exceptions as enumerating activities that the terms 'shall not include.'" (App. 29a-30a). While the affirmative phrase "shall include" may articulate a non-exhaustive list, *see FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 246 n.3 (1986) ("*MCFL*"), the same cannot be said of the phrase "shall *not* include." Were the courts to adopt a canon of statutory interpretation that deemed the phrase "shall not include" to be merely illustrative, then carefully drawn exceptions to a general prohibition, such as those found in § 441b(b), would invite the enforcement agency to invent limitless exceptions of its own.

The carefully drawn exceptions to § 441b's general prohibition of corporate political spending do not create any ambiguity about the FEC's power to adopt the Debate Regulations and cannot justify judicial deference to the agency's interpretation of the FECA.

2. The FEC does not claim, and the Court of Appeals did not find, that the activities fostered by the challenged Debate Regulations *are* "nonpartisan registration and get-out-the-vote campaigns" within the meaning of § 441b(b)(2)(B).

Instead, the FEC has asserted that its regulation should be upheld merely because candidate debates "are *similar* in nature and purpose" to registration and get-out-the-vote activity. Resp. Br. 13; 44 Fed. Reg. 76,735 (1979) (emphasis added). At the same time, however, the FEC concedes that "an administrative agency ordinarily lacks power to announce exceptions to a facially unqualified and unambiguous statutory command." Resp. Br. 9. The authority given by § 441b(b)(2)(B) to grant exemptions for "nonpartisan registration and get-out-the-vote campaigns" does not create authority to grant exemptions for every remotely "similar" activity.

The conference committee report that the FEC relies upon merely recites that corporations should be permitted "to take part in *nonpartisan registration and get-out-the-vote activities*" aimed at the general public. Resp. Br. 12; H.R. Conf. Rep. No. 1057, 94th Cong., 2d Sess. 63-64 (1976) (emphasis added). Even if this report were deemed to voice Congressional purpose, the conference committee pointedly did not express any intent to permit corporations to fund every activity that might incidentally encourage people to vote or register to vote. Wherever one draws the line around what constitutes "nonpartisan registration and get-out-the-vote activities," the candidate debates permitted by the FEC's Debate Regulations, which are structured to give selected candidates an opportunity to wage their campaigns before a national audience, fall well outside that boundary.

Resort to the general provisions of § 431(9)(B)(ii) makes no difference. Staging candidate debates cannot reasonably be deemed to be "nonpartisan activity designed to encourage individuals to vote or to register to vote." Indeed, recent presidential "debates" have featured alternating, rehearsed speeches by selected candidates, followed by closing statements in which candidates face the cameras and directly solicit viewers' votes. These debates constitute corporate-funded campaign activity that lies at the core of FECA's prohibitions. While candidate debates may incidentally encourage some people to vote or to register to vote, they are designed to give selected candidates a pivotal opportunity to advance their own campaigns in connection with federal elections. The First Circuit decision, allowing the FEC to breach the tenuous firewall between corporate money and the integrity of our elections, should be reversed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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